FILED

94 747 OCT 24 1994

(1)

IN THE OFFICE OF THE CLERK

SUPREME COURT OF THE UNITED STATES

October Term, 1994

Case No. _____

EVA M. HUBER,

Petitioner,

v.

CURTIS B. DANNING, TRUSTEE,

Respondent,

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

PETITION FOR WRIT OF CERTIORARI

Ralph G. Pagter
Counsel of Record
R. Gibson Pagter, Jr.

Pagter Law Corporation

1551 N. Tustin Avenue
Suite 850
Santa Ana, California 92701
(714) 541-6072

Attorneys for Petitioner,

Eva M. Huber

123

QUESTIONS PRESENTED

1. Did the Ninth Circuit err in holding that Bankruptcy Code Section 544(a)(3) authorizes a Chapter 7 Trustee to avoid the interest of the beneficiary of a constructive interest in property in which the Debtor holds an interest, or did the Second, Fifth, Eighth, and Eleventh Circuits correctly hold that Bankruptcy Code Section 541(d) precludes such avoidance?

2. Did the Ninth Circuit err in holding that, under applicable law, Respondent lacked inquiry or constructive notice of Petitioner's interest in certain real property when he acquired an interest in that property?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	3
BASIS FOR FEDERAL JURISDICTION . . .	4
STATEMENT OF THE CASE.	5
STATEMENT OF FACTS	6
REASONS FOR GRANTING THE WRIT. . . .	11
I. THE NINTH CIRCUIT'S UNPUBLIHED DECISION IN HUBER VS. DANNING FURTHERS IT PUBLISHED OPINIONS WHICH DIRECTLY CONFLICT WITH DECISIONS OF FOUR OTHER CIRCUIT COURTS	13
II. THE DECISION OF THE COURT OF APPEALS UPHOLDING RESPONDENT'S LACK OF INQUIRY OR CONSTRUCTIVE NOTICE IS ERRONEOUS	18
CONCLUSION	38

TABLE OF CONTENTS - CONTINUED

Page

APPENDIX A

OPINION, UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED JULY 27, 1994. . . . . .A-1

APPENDIX B

MEMORANDUM DECISION, UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE NINTH CIRCUIT, FILED DECEMBER 3, 1992 . . . . . .B-1

APPENDIX C

SUMMARY JUDGMENT, UNITED STATES BANKRUPTCY COURT, CENTRAL DISTRICT OF CALIFORNIA, ENTERED AUGUST 21, 1991. . . . . .C-1

APPENDIX D

FINDINGS OF FACT AND CONCLUSIONS OF LAW ENTERED AUGUST 21, 1991. . . . . .D-1

TABLE OF AUTHORITIES

Cases — Page

UNITED STATES SUPREME COURT

In re Whiting Pools, ___ U.S. ___, 111 S. Ct. 654, ___ L. Ed. 2d ___ (19) 12, 23, 25 34

United States v. Ron Pair Enter., Inc. 489 U.S. 235, 109 S. Ct. 1026, 103 L. Ed. 2d 290 (1989) . . 36

CIRCUIT COURTS OF APPEAL

Cf.In re: Professional Investment Properties of America, 988 F. 2d 623 (9th Cir. 1992), cert den Miller v Briggs (1993), 113 S. Ct. 63, 121 L Ed 2d 31, reh den 113 S. Ct. 638, 121 L. Ed 2d 569 28

Chbat v. Tleel, 876 F.2d. 769, 772 (9th Cir. 1989) 19, 20

In re General Coffee Corp, 828 F. 2d 600 (11th Cir. 1987) . . . 15

In re Lewis Shurtleff, Inc., 778 F. 2d 1416, 1419 (9th Cir. 1985) 16, 17

In re North American Coin & Currency, Ltd, 767 F. 2d 1573, 1575 (9th Cir. 1985), cert den, 475 U.S. 1083, 106 S. Ct. 1462, 89 L Ed 2d 719 (1986)) . . . 16, 17, 36

CIRCUIT COURTS OF APPEAL (cont)

In re Probasco,
839 F.2d 1352, 1354-1355
(9th Cir. 1988) 18, 21

In re Weisman,
5 F. 3d 417, 420
(9th Cir. 1993) 19, 31, 32

National Bank of Alaska v. Erickson
(In re Seaway Express Corp.),
912 F.2d 1125
(9th Cir. 1990) 18, 19, 35

N.S. Garrott & Sons,
772 F. 2d 462, 467
(8th Cir 1985) 15

Sanyo Electric, Inc. v. Howard's
Appliance Corp. (In re: Howard's
Appliance Corp., 874 F. 2d 88, 93
(2d Cir. 1989) 15

Unicom Computer Corp.,
13 F. 3d 321, 325
(9th Cir. 1994) 17, 18, 37

Vineyard v. McKenzie
(In re Quality Holstein Leasing),
752 F.2d 1009, 1013
(5th Cir. 1985) 13, 14, 15

BANKRUPTCY APPELLATE PANEL

Huber v. Danning (In re Thomas),
No. 93-55044
(9th Cir. July 27, 1994) . . 1, 31, 38

BANKRUPTCY COURTS

In re Comstock Financial Services, Inc.
111 B.R. 849, 859
(Bk. C.D. Cal. 1990) 32

In re Mill Concepts Corp.
123 B.R. 938, 948
(Bk.D. Mass. 1991) 35

CALIFORNIA COURTS

Evans v. Faught,
321 Cal.App.2d 698,
42 Cal. Rptr. 133 (1965) 26

High Fidelity Enterprises, Inc. v. Hull
210 Cal.App.2d 279,
26 Cal. Rptr. 654 (1962) 27

Scheerer v. Cuddy,
85 Cal. 270 (1890) 22, 24, 25

OTHER STATE CASES

Beebe Stave Co. v. Austin,
122 S.W. 482
(Ark. 1909) 25

UNITED STATES STATUTES **Page**

11 U.S.C. §541(d) . 1, 3, 13, 14, 33, 35
11 U.S.C. §544(a) 13, 28, 33
11 U.S.C. §544(a)(3) 1, 3, 6
. . . . . 11, 13, 18, 19
. . . . . 32, 35, 36
11 U.S.C §547 . . . . . 16, 17, 37
28 U.S.C. §157(b)(2)(B,C,K & O) . . . 4
28 U.S.C. §158(b) 4
28 U.S.C. §158(d) 5
28 U.S.C. §1254(1) 3

CALIFORNIA STATE STATUTES

California Civil Code §19 20

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

EVA M. HUBER,

Petitioner,

v.

CURTIS B. DANNING, TRUSTEE,

Respondent,

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a Writ of Certiorari issue to review a decision of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The unpublished Opinion of the United States Court of Appeals for the Ninth Circuit is reprinted as Appendix A herein. The slip opinion citation is Huber v.

Danning (In re Thomas),
No. 93-55044 (9th Cir. July 27, 1994).

The Decision of the United States Bankruptcy Appellate Panel of the Ninth Circuit, which was published at 147 B.R. 526 (9th Cir. BAP 1992), is reprinted as Appendix B herein.

The Summary Judgment of the United States Bankruptcy Court, Central District of California, which also was not published, is reprinted as Appendix C herein.

The Findings of Fact and Conclusions of Law of the United States Bankruptcy Court, Central District of California, are reprinted as Appendix D herein.

JURISDICTION

The Opinion of the Court of Appeals for the Ninth Circuit was filed on July 27, 1994, affirming the Opinion of the United States Bankruptcy Appellate Panel of the Ninth Circuit, which, in turn, affirmed

the Summary Judgment of the United States Bankruptcy Court, Central District of California, in favor of the Respondent. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

Bankruptcy Code Section 544(a)(3) provides, in pertinent part, that a trustee has, as of the commencement of the bankruptcy case, and without regard to his/her or any creditor's actual knowledge, "the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by... (3) a [hypothetical] bona fide purchaser of real property [existing as of the bankruptcy case filing]."

Bankruptcy Code Section 541(d) provides, in relevant part: "Property in which the debtor holds, as of the commencement of the case, only legal title

and not an equitable interest... becomes property of the estate only to the extent of the debtor's legal title to such property...."

BASIS FOR FEDERAL JURISDICTION

The jurisdiction of the United States Bankruptcy Court for the Central District of California to consider the issue of the avoidance of Huber's interest lies in 28 U.S.C. Section 157(b)(2)(B,C,K,& O) which grants bankruptcy courts jurisdiction to hear core proceedings involving the determination of the claims against the estate and counterclaims by it, to determine lien issues, and matters affecting the debtor-creditor relationship. The jurisdiction of the United States Bankruptcy Appellate Panel of the Ninth Circuit to hear Huber's timely appeal from the bankruptcy court's final judgment against Huber is provided by 28 U.S.C. Section 158(b).

The jurisdiction of the United States Court of Appeals for the Ninth Circuit to hear Huber's timely appeal from the Ninth Circuit's Bankruptcy Appellate Panel is provided by 28 U.S.C. Section 158(d).

STATEMENT OF THE CASE

In September 1990 Petitioner sued Respondent for declaratory relief in U.S. Bankruptcy Court for the Central District of California. She alleged that Respondent, the Chapter 7 trustee of the bankruptcy estate of Lance Thomas, held Huber's residence, a piece of improved real property, in constructive trust for her, and that her interest followed the net sales proceeds of that residence, of approximately $260,000. The bankruptcy court granted Respondent's motion for summary judgment to avoid Huber's claimed trust interest and took all the sales proceeds free and clear thereof for the benefit of the Thomas bankruptcy estate.

Huber timely appealed this decision to the Bankruptcy Appellate Panel ("BAP") for the Ninth Circuit. In a 2-1 opinion, recognizing the split among the Circuits at issue here as to a Trustee's power to avoid the claim of a constructive trust beneficiary under Bankruptcy Code Section 544(a)(3), the BAP affirmed the lower court. Huber timely appealed to the Ninth Circuit Court of Appeals. The Ninth Circuit affirmed the BAP, but sidestepped the conflict among the Circuits on this issue by concluding, on the facts, that Respondent had no inquiry or actual notice of Huber's interest in the real property.

STATEMENT OF FACTS

As her reward for voluntarily advising Respondent herein, long after Thomas' bankruptcy case had been closed with no payment to any creditor, that Thomas may have had an interest in Huber's residence as of the commencement of his

bankruptcy case which he failed to schedule or disclose to Respondent, Huber lost over $260,000, her life savings, by losing the equity she had in the residence. Huber's trouble began in approximately June 1988, when Thomas, Huber's then-boyfriend, moved into the home where she lived with her 80-year old mother and her two minor daughters. At about that time Huber requested that Thomas loan her money on an as-needed basis so she could keep current on the home mortgage payments and also have Thomas perform certain improvements to the home. At no time was Huber ever married to Thomas.

In late July 1988 Thomas requested Huber give him some sort of written security interest in the home to secure any loans made to that date and loans to be made in the future, whether in the form of payments or improvements. She relied upon him to provide her with the proper

document to give Thomas only a security interest. Unfortunately, Thomas presented her with a document labelled "Individual Grant Deed" which she signed and dated on August 1, 1988 (**"HUBER DEED"**) and delivered to Thomas, who simultaneously stated that Huber was granting him only a security interest in the home, that he would keep the HUBER DEED in his safe at his place of business, that he would not record the document unless Huber became terminally ill or died, and that if he should die or become terminally ill his associate at work would return the HUBER DEED to Huber, unrecorded. Pursuant to this agreement between June 1988 through the date Thomas filed his Chapter 7 case, on November 21, 1988 Thomas loaned Huber approximately $26,030.55. Between June 1988 and January 1989 he made approximately $5,000.00 in improvements to the home, and after his Chapter 7 case was filed he loaned Huber an additional

$11,922.76.

At the time Huber executed the HUBER DEED, the liens against the home totalled approximately $512,000; at that time the home was worth approximately $850,000, based upon the selling prices of comparable homes in Huber's neighborhood.

On or about August 10, 1988 Thomas gave a grant deed to one Howard Gunderson, purporting to transfer the home to him; this grant deed was not recorded until January 27, 1989.

Between November 21, 1988 and January 26, 1989 Thomas never informed Huber that he had filed a Chapter 7 Petition; she only learned of the bankruptcy in late January 1989 through her friend, when she tried to sell her home.

At all times from March 3, 1982 through January 26, 1989 Huber was the owner of record of her home.

If anyone had asked Huber, or her daughters, at any time between August 1,

1988 through and including January 26, 1989 who owned the home, all three would have answered that Huber owned the property -- not Thomas. At all times between August 1, 1988 and January 26, 1989 HUBER's mother lived in a separate guest house unconnected to the house and almost always kept that guest house locked from within. Both of Huber's minor daughters had their own bedrooms at the home and whenever they were away from these rooms kept [them] locked, as a general rule. Each had a lock with her own key. Thomas did not have a copy of these keys.

In July Huber's attorney, R. Gibson Pagter, Jr., advised her to contact Respondent forthwith regarding the estate's potential interest in the home since for Huber to complete her proposed sale of it could be criminal bankruptcy fraud. In his Application to Reopen Thomas' case, Respondent admitted it

appeared Thomas only had an interest in real property [the home] worth approximately $43,000. Sometime before April 1990 Huber received copies of IRS forms 1099-INT and 1099-S from either Respondent or his accountants, which documents reflect that Huber, not the estate of Thomas, was the transferor of the home.

REASONS FOR GRANTING THE WRIT

In its unpublished opinion herein, the Ninth Circuit has further reified its position, a position in conflict with that held by the Second, Fifth, Eighth, and Eleventh Circuits, that Bankruptcy Code Section 544(a)(3) authorizes a trustee to avoid a constructive trust beneficiary's claim of interest in property of the estate, a position that stands to benefit admittedly dishonest debtors who can cheat their victims out of property pre-bankruptcy, then rush to bankruptcy with their ill-gotten gains, in order to create a pool of assets to pay their creditors.

Furthermore the trial court, the 2-judge majority of the BAP below, and the Ninth Circuit below clearly erred in concluding that Respondent lacked either inquiry or constructive notice of Huber's interest in the home on November 21, 1988 and on January 29, 1989. The Ninth Circuit's decision must not be allowed to stand for the following reasons.

First, the Ninth Circuit's decision here continues a direct conflict with decisions in the Second, Fifth, Eighth and Eleventh Circuits on the scope of a trustee's avoidance powers as against constructive trust beneficiary claimants.

Second, the Ninth Circuit's decision effectively punishes Huber for following the law in reporting her discovery of Thomas' hidden asset, i.e., his interest in her home, to Respondent, which may deter similar reporting by others to bankruptcy trustees of hidden assets.

I. THE NINTH CIRCUIT'S UNPUBLISHED DECISION IN HUBER VS. DANNING (In re Thomas) FURTHERS ITS PUBLISHED OPINIONS WHICH DIRECTLY CONFLICT WITH DECISIONS OF FOUR OTHER CIRCUIT COURTS.

At least four other Courts of Appeal have decided that property impressed with a constructive trust is immune from avoidance under § 544(a). The Fifth Circuit reached this conclusion by holding § 541(d) overrides § 544(a). Vineyard v. McKenzie (In re Quality Holstein Leasing), 752 F.2d 1009, 1013 (5th Cir. 1985). Unlike the constructive trust claimant in Quality Holstein whose constructive remedy was denied, Huber was the direct victim of fraud. The Quality Holstein court analyzed the interplay of §§ 541(d) and 544(a)(3), reasoning:

> ...section 544[a] does not entitle a trustee to retain for the benefit of the estate all property regardless of the means--fair or foul--by which the

debtor obtained it....

We start with the proposition that imposition of a constructive trust under state law upon a ... debtor's property generally confers on the true owner of the property an equitable interest in the property superior to the trustee's. As we recently stated in construing section 541(d):

'With regard to property held by [a] trustee, "the rule is elementary that the estate succeeds only to the title and rights in the property that the debtor possessed....Therefore... the estate will generally hold such property subject to the outstanding interest of the beneficiaries.'" [Citation omitted.] Quality Holstein at page 1012.

That Court further stated:

As a general rule, it must be held that section 541(d) prevails over the trustee's strong-arm powers. Although these powers allow a trustee to assert

rights that the debtor itself could not claim to property, Congress did not mean to authorize a bankruptcy estate to benefit from property that the debtor did not own. Where state law impresses property that a debtor holds with a constructive trust in favor of another, and the trust attaches prior to the petition date the trust beneficiary normally may recover its equitable interest in the property through bankruptcy court proceedings. Id. at 1013-1014. This decision was followed in Sanyo Electric, Inc. v. Howard's Appliance Corp. (In re: Howard's Appliance Corp., 874 F. 2d 88, 93 (2d Cir. 1989). See also In re General Coffee Corp, 828 F. 2d 600 (11th Cir. 1987). The Court in In re N.S. Garrott & Sons, 772 F. 2d 462, 467 (8th Cir. 1985) likewise followed Quality Holstein. In Garrott, an escrow fund technically property of the estate was held to be subject to a constructive trust in favor

of an intended beneficiary of the fund.

Contrary to the foregoing, the Ninth Circuit has declined to accept that the bankruptcy estate automatically does not include property which, under state law, is subject of a constructive trust. In re Lewis Shurtleff, Inc., 778 F. 2d 1416, 1419 (9th Cir. 1985) (inchoate constructive trust claim does not defeat trustee's avoidance action under Section 547) (quoting In re North American Coin & Currency, Ltd, 767 F. 2d 1573, 1575 (9th Cir. 1985), cert den, 475 U.S. 1083, 106 S. ct. 1462, 89 L Ed 2d 719 (1986)). Instead the Ninth Circuit relies on a theory that the bankruptcy policy of ratable distribution among creditors outweighs the policy of equitably balancing interests in imposing a constructive trust. North American at p. 1575. Yet at the same time the Ninth Circuit admits that bankruptcy trustees have no interest in property acquired by a

debtor's fraud as against the rightful owner thereof. Id at p. 1575-1576 (citing 8th Circuit and 3rd Circuit case law). In North American the Ninth Circuit reasoned the victims seeking a constructive trust over a fund containing many victims' commingled monies must share on a prorated basis. In both North American and Lewis Shurtleff the Ninth Circuit feared a flood of claims by inchoate constructive trust interests, yet neither decision carved out an exception to the rigid rule of exclusion for choate constructive trust interests. Nevertheless a later and different Ninth Circuit panel in Unicom Computer Corp., 13 F. 3d 321, 325 (9th Cir. 1994), while purporting to distinguish North American on its facts, defeated a trustee's avoidance action under Section 547, arguing the alleged preference was a one-time mistaken payment by the affected party to the debtor instead of a third party (which the debtor

then repaid to the third party before bankruptcy, and then sought to avoid after filing bankruptcy). The Unicom panel describes the Ninth Circuit's amorphous standard that state law is but a starting point in determining whether a constructive trust may arise in a federal bankruptcy case, to be applied in a manner not inconsistent with federal bankruptcy law.

The Ninth Circuit thus is in conflict with itself on this issue.

II. THE DECISION OF THE COURT OF APPEALS UPHOLDING RESPONDENT'S LACK OF INQUIRY OR CONSTRUCTIVE NOTICE IS ERRONEOUS

A. The Ninth Circuit recognizes the general principle that § 544(a)(3) does not make inquiry or constructive notice irrelevant. In re Probasco, 839 F.2d 1352, 1354-1355 (9th Cir. 1988); National Bank of Alaska v. Erickson (In re Seaway Express Corp.), 912 F.2d 1125 (9th Cir.

1990) Chbat v. Tleel, 876 F.2d. 769, 772 (9th Cir. 1989); and In re Weisman, 5 F. 3d 417, 420 (9th Cir. 1993). In Seaway, the Ninth Circuit held in dictum: "even if it is assumed that the interest could qualify for a constructive trust, if the trustee had no actual or constructive notice of the interest under state law, the trustee takes free and clear of that interest." Seaway at page 1129. Here Huber submits Respondent had such constructive notice. In Tleel, the Court concluded that because the party seeking a constructive trust, based on a secret oral partnership, which itself owned real property, could not prevail because that claimant was not in possession of the property and did not otherwise present evidence to the court that would place the trustee on constructive or inquiry notice to defeat a § 544(a)(3) action. As in Seaway the Tleel court specifically concluded the trustee had no constructive

or inquiry notice, Tleel at page 772.

California Civil Code § 19 (West's 1985) reads:

> "Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, in prosecuting such inquiry, he might have learned such fact."

A prudent person seeking to buy Huber's home on November 21, 1988 and on January 26, 1989 would learn that record title was in Huber. Whereas the Ninth Circuit decided such a prudent buyer would see the HUBER DEED and believe it to confer valid title upon recording, Huber submits this was clearly erroneous. At all relevant times the tax roll reflected that Huber was the record owner, four persons unrelated to any alleged seller (other

than Huber), by blood or marriage, lived on the property, and several rooms were inaccessible. Certainly such a prudent purchaser would inquire of any one or all of the four unrelated persons who the owner of the property was, to which three of them would have replied: Huber. (Huber's mother speaks little or no English.)

The Ninth Circuit's conclusion that Huber's occupancy of the home, with Thomas, on November 21, 1988 (and through January 27, 1989) with her three family members, all of whom were unrelated to Thomas by blood or marriage and kept their doors separately locked and inaccessible to Thomas, was a reasonable family living arrangement, is also clearly erroneous. These were not ordinary privacy desires but evidence that Thomas did not have access to, i.e., own, the entire home. In Probasco, the court concluded a debtor-in-possession had constructive notice of a

third party's interest in one piece of real property consisting of three parcels encircled by a single fence where the debtor-in-possession was of record on only two of the three parcels. Similarly here Huber's family members effectively fenced in their rooms. This evidence mandates a finding that Respondent, as a hypothetical bona fide purchaser, should have inquired further, beyond the HUBER DEED.

For over 100 years, California law has held a potential bona fide purchaser of real estate is placed on inquiry notice when that purchaser finds locked doors to which the purported seller has no access. In Scheerer v. Cuddy, 85 Cal. 270 (1890), the Court held a buyer had inquiry notice of an unrecorded lease to a third party who had leased some rooms in a building, where on inspection those rooms were locked and the seller had no access. That holding is not and should not be limited to commercial situations, but should be

properly interpreted to prevent fraud in residential real property circumstances such as the one before the Court here. The presumption of inquiry notice defeating the bona fides of an alleged purchaser may only be overcome by the purchaser upon proof:

> "of diligent, unavailing effort by the vendee to discover or obtain actual notice of any legal or equitable rights in behalf of the party in possession. And when the location of the lands is such as to render personal application to an inquiry of the occupant practicable, a purchaser failing to make such application and inquiry is no more entitled to be regarded a purchaser in good faith than if he had so inquired and ascertained the real facts of the case." Id. at 273,

citation omitted.

The Scheerer Court also found:

> "Whether the [buyer] knew of the [non-vendor's] possession or not is immaterial. It was his duty to know who was in possession of the property before making the purchase, and his purchase without ascertaining the fact must be regarded as the strongest evidence of bad faith on his part. The burden of making the proper inquiry was cast upon him by the mere fact of actual possession on the part of the [non-vendor]. If it were allowed that by failing to acquaint himself with the fact of possession on the part of another than the vendor, the vendee could avoid the affect of the rule above stated, he could purposely avoid any inquiry on the subject, and thereby evade

the rule and its consequences entirely." Ibid.

In Scheerer, the Court ruled against a vendor in possession. Plaintiff's assignor in Scheerer, John Bryson, only "leased certain of the rooms in the building" (Id. at page 271) to a third party and the third party took possession of the rooms but did not record its lease. If only certain of the rooms in the building were leased, then the vendor was in possession of the remainder. So too here Thomas and/or Respondent was at best a hypothetical vendor in possession of a portion of the home.

The Ninth Circuit and the BAP majority below completely ignored this California case, and focussed instead on contrary ones from California and other jurisdictions, including an ancient one from Arkansas, Beebe Stave Co. v. Austin,

122 S.W. 482 (Ark. 1909), that occupancy by a stranger to title, alone, does not provide constructive notice of that stranger's interest. More importantly, these very cases support Huber, in that Respondent, not Huber, was the undisputed stranger to record title on the Petition Date, despite the existence of the unrecorded HUBER DEED.

In Evans v. Faught, 321 Cal.App.2d 698, 42 Cal. Rptr. 133 (1965), the Court found that a City's exclusive occupancy of part of a larger piece of raw land being sold, on which parcel the City had built a structure and a road pursuant to a unrecorded lease, put the buyer on inquiry notice of the City's interest, where the possession was "open, notorious, exclusive, adverse, and not consistent with the record of title." Id. at page 137. Citations omitted.) The possession by Huber's minor children and mother of rooms in and on the home likewise was

open, notorious, exclusive, and adverse as to Thomas and, therefore, to a hypothetical bona fide purchaser, on November 21, 1988 and through January 27, 1989. In contrast, in High Fidelity Enterprises, Inc. v. Hull, 210 Cal.App.2d 279, 26 Cal. Rptr. 654 (1962), the Court concluded that a proposed buyer took free of the claim of the holder of an unrecorded deed, where that holder had simply stored materials of negligible value in a dilapidated barn on an otherwise vacant lot. Because the courts below erred in applying California law to the facts of this case their decisions should be reversed.

Further, under applicable Ninth Circuit law the courts below should have concluded that the contents of Thomas' bankruptcy petition, evidencing his residence address as one other than the home, put Respondent on inquiry notice of Huber's interest in the home, an unscheduled asset of and

address for debtor. Cf. In re: Professional Investment Properties of America, 988 F. 2d 623 (9th Cir. 1992), cert den Miller v Briggs (1993), 113 S. Ct. 63, 121 L Ed 2d 31, reh den 113 S. Ct. 638, 121 L. Ed 2d 569.

In Professional Investment, supra., a case in which the 9th Circuit addressed the issue of constructive inquiry notice in opposition to a trustee's strong-arm powers under Section 544(a), Biggs filed an involuntary petition, reciting in the petition itself that he held a deed of trust on property of the Debtor. The Court found that the petition itself constituted constructive notice: "...the trustee need only have contacted Biggs to determine their specific interest." Id. at 1470. The 9th Circuit also stated:

> "The bankruptcy court found factually that a diligent title search would disclose a bankruptcy filing. Secondly, it

found that 'a reasonably prudent purchaser of the debtor's property would be placed on notice of the contents of bankruptcy pleadings from the time of their being filed." Id. 1469.

[Emphasis added.]

However, the bankruptcy court came to the erroneous conclusion:

"...'any constructive notice of plaintiffs' interest achieved by filing the original bankruptcy pleadings comes too late to secure their interest in a position prior to that acquired by the trustee'."

Id. at 1469.

The Court then held:

"The bankruptcy court's findings

> of fact support this holding even if its conclusions of law do not. The court determined that a 'reasonably prudent purchaser of the debtor's property would be placed on notice of the bankruptcy pleadings from the time of their being filed.' This statement is consistent with the district court's holding that the petition simultaneously provided notice to the trustee. Consequently, while we adopt the bankruptcy's [sic] court's findings of fact, we hold that the district court arrived at the correct legal conclusion."

Id. at 1470.

The bankruptcy court findings were adopted by both the District Court and the Court of Appeal: the bankruptcy court found that a diligent title search would

have led to the discovery of the bankruptcy petition which would have put a 'reasonably prudent purchaser' on inquiry notice of the contents of the bankruptcy pleadings.

The case at bar is even simpler then Professional Investment; i.e., a diligent title search would have revealed Huber as the record owner of the home on November 21, 1988. Since record title is sufficient to create inquiry notice, Respondent in the case at bar had notice of Huber's interest in the home and took title to the home subject to Huber's claim of constructive trust ownership. After deciding Professional Investment and before deciding Huber v. Danning the Ninth Circuit decided In re Weisman, 5 F. 3d 417 (9th Cir. 1993). There the Ninth Circuit concluded that under California law a trustee had inquiry notice that a debtor-ex-wife's record title interest in real property occupied exclusively by her non-

debtor-ex-husband and his new wife thus defeating the trustee's bona fide purchaser status under Section 544(a)(3). Unfortunately for Huber, while the Ninth Circuit panel in Weisman was "[g]uided by reality" (Id at 419), Huber submits the different Ninth Circuit panel deciding her case was not.

B. HUBER'S INTEREST IS NOT THE TYPE OF INCHOATE CLAIM THAT SECTION 544(a)(3) WAS DESIGNED TO CUT-OFF

In In re Comstock Financial Services, Inc., 111 B.R. 849, 859 (Bk. C.D. Cal. 1990) the bankruptcy court declined to approve of a constructive trust claim by certain defrauded creditors as against similarly defrauded creditors who had not sought to enforce their constructive trust rights. Under those facts, the Court concluded that constructive trust would not be applied. Here Huber was the only victim of Thomas' fraud involving the home. Thomas' other creditors, including

his administrative creditors, like Respondent and his law firm, are not similarly situated.

By following the plain meaning of Section 541(d), that property impressed with a constructive trust prior to the commencement of a bankruptcy case is immune from a trustee's avoiding powers under § 544(a) under all circumstances, fosters the important public policies that a bankruptcy court should do equity, instead of protect dishonest debtors. It also ensures that strict enforcement of state law in determining a claimant's rights in a bankruptcy case prevents a debtor [or that debtor's trustee] from expanding state property rights to the detriment of other parties. The evidence before the trial court in this matter explicitly establishes that Respondent never would have learned of the estate's interest in the home if Huber had not contacted him in July 1989. How equitable

is it to avoid her interest entirely to benefit Respondent, his law firm, and all of Thomas' creditors, under all of the facts of this case? Unlike those bankruptcy cases where some of multiple similarly-injured victims of a debtor seek to impose a constructive trust, here Huber alone was victimized by the debtor in a unique and cruel scam. On these factual grounds alone the Ninth Circuit should have distinguished its prior rulings where ratable distribution was paramount. The United States Supreme Court has itself in a footnote defining "property of the estate" declared: "We note ... that Congress plainly excluded property of others held by the debtor in trust at the time of the filing of the petition". In re Whiting Pools, 462 U.S. 198, 205 n.10 (1983). The Ninth Circuit limits the plain meaning of this Supreme Court case to those trusts a particular bankruptcy judge or appellate court decides should apply

under a federalized form of state law. This limitation must be corrected and aligned with the majority of other circuits.

C. A TRUSTEE MAY NOT AVOID AN "INTEREST" IN THE DEBTOR'S PROPERTY UNDER § 544(A)(3)

Although the Ninth Circuit in In re Seaway, supra, at pages 1129-1130 has held that § 544(a)(3) applies even when no transfer has taken place, HUBER submits this conclusion is either incorrect or inapplicable to the case at bar. By its plain language, § 544(a)(3) only authorizes the TRUSTEE to avoid a "transfer of property" -- not an interest of a third party in property held by the debtor. The bankruptcy court in In re Mill Concepts Corp., 123 B.R. 938, 948 (Bk.D. Mass. 1991), after reasoning that § 544(a)(3) could not override § 541(d) wisely opined: "unless literally read, § 544(a)(3) can be a refuge for rascals and their creditors." This literal

interpretation of § 544(a)(3) comports with the United States Supreme Court's opinion that unambiguous statutes should not be interpreted or modified by the judicial fiat of lower courts. See, e.g. In re United States v. Ron Pair Enterprises, __U.S.__, _L.Ed. 2d._, 109 S. Ct. 1026 (1989). Courts of equity should not promote pre-petition frauds by debtors who can, through pre-petition planning, bring their ill-gotten gains into a bankruptcy estate for payment of administrative and priority claims at the expense of their defrauded victims. Furthermore, as the BAP dissent points out in this case the "ratable distribution" public policy theory favoring strong-arm powers over constructive trust claims should not apply where, as here, there are no similarly situated victims of fraud among the bulk of Thomas' creditors. See, e.g. In re North American Coin & Currency, Ltd., 767 F. 2d 1573 (9th Cir. 1985), Op.

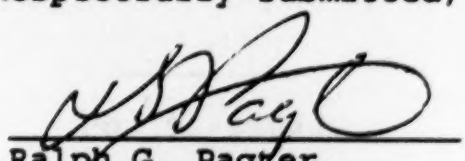
Modified, 774 F.2d. 1390 (1985), cert. den., 475 U.S. 1083 (1986). See also Unicom Computer Corp., 13 F. 3d 321 (9th Cir. 1994). In Unicom the Ninth Circuit ruled money accidentally paid by one party to the debtor, instead of to another party, which the debtor then repaid to the payer, was property held in in inchoate constructive trust by the debtor and its bankruptcy estate under California law. Thus it was not subject to avoidance by trustee under Bankruptcy Code Section 547. Yet the Unicom panel did not reconcile the choate vs. inchoate dichotomy in prior case law. Rather it seems the Unicom panel followed practical reality and achieved equity.

CONCLUSION

This Court should grant Huber's instant petition to resolve the conflict in the circuits, within the Ninth Circuit itself, and correct the Ninth Circuit's error here. WHEREFORE, Petitioner, Eva M. Huber, prays that a writ of certiorari issue from this Honorable Court to review the judgment of the United States Court of Appeals for the Ninth Circuit, Huber v. Danning (In re Thomas), No. 93-55044 (9th Cir. July 27, 1994). In the event this petition is granted, Petitioner prays that the judgment of the Ninth Circuit be reversed and that the cause be remanded with directions to reverse both the judgments of the United States Bankruptcy Appellate Panel of the Ninth Circuit and the United States Bankruptcy Court for the Central District of California, and for the United States Bankruptcy Court for the Central District of California to enter

summary judgment in favor of Huber on her Complaint for Declaratory Relief.

Respectfully submitted,



Ralph G. Pagter,
Counsel of Record
R. Gibson Pagter, Jr.
Pagter Law Corporation
1551 N. Tustin Avenue,
Suite 850
Santa Ana CA 92701
(714) 541-6072

Attorneys for Petitioner,
Eva M. Huber

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 93-55044

BAP No. CC-91-01889-VPMe

In re LANCE E. THOMAS

Debtor.

EVA M. HUBER,

Plaintiff/Counter-Defendant/Appellant,

v.

CURTIS B. DANNING, Trustee,

Defendant/Counter-Plaintiff/Appellee.

Argued and Submitted June 9, 1994

Pasadena, California

Filed: July 27, 1994

Appeal from

the United States Bankruptcy

Appellate Panel

of the Ninth Circuit

Before: FARRIS, O'SCANNLAIN, and TROTT,
Circuit Judges

Eva Huber appeals the decision of the Bankruptcy Appellate Panel ("BAP") affirming a bankruptcy court summary judgment which avoided her interest in certain property (the "Property") under section 544(a)(3) of the Bankruptcy Code and declared that a bankruptcy trustee (the "Trustee") holds free and clear title to the proceeds from the sale of this property.

I

Huber's adversary proceeding asserted an equitable interest in the Property and its proceeds in the form of a constructive trust. Huber contends that section 544 (a)(3) does not permit the Trustee to avoid a constructive trust.

We rejected this contention in In re Seaway Express Corp., where we held that, "even if it is assumed that the interest court qualify for a constructive trust, if

the trustee had no actual or constructive notice of the trust under state law, the trustee takes free of that interest." 912 F.2d 1125, 1129 (9th Cir. 1986) (internal quotations omitted). Recognizing this, Huber asserts that Seaway should be distinguished or called en banc. Because Huber offers no explanation of how to distinguish Seaway and does not demonstrate how Seaway's outcome qualifies for en banc review, see Fed. R. App. P. 35(a), we reject her argument.

II

Huber also contends that the Trustee had constructive or inquiry notice when it took an interest in the Property. In determining whether a person has constructive or inquiry notice, "the question is whether a prudent purchaser, in light of the information reasonably available to him on the date [a debtor] filed [his or her] bankruptcy petition, would have made an inquiry into the

possibility that [a creditor] owned [a] residence outright." In re Weisman, 5 F.3d 417, 420 (9th Cir. 1993) (applying California Civil Code section 19) (internal citations omitted). We review a bankruptcy court's conclusion regarding the existence of inquiry or constructive notice under the clearly erroneous standard. In re Professional Invest. Props. of Am., 955 F.2d 623, 626 (9th Cir.), cert. denied, 113 S. Ct. 63 (1992); In re Probasco, 839 F.2d 1352, 1355 (9th Cir. 1988) ("The decision of the bankruptcy court that there was not constructive notice is based on inferences from the undisputed facts. Although . . . an appellate court is equally capable of making those inferences, the dictates of judicial economy require application of the clearly erroneous standard.")

The bankruptcy court concluded that Huber had failed to adduce evidence establishing constructive or inquiry

notice. Huber has introduced a variety of evidence to challenge this conclusion.

First, because Thomas did not record the Huber deed until after he had declared bankruptcy, Huber was the record title holder at the time that Thomas filed his bankruptcy petition. This fact did not create inquiry notice. A reasonable person buying Property from Thomas would have seen that the unrecorded Huber deed came from a record title holder and, therefore, would confer valid title upon recording. Beebe Stave Co. v. Austin, 122 S.W. 482, 484 (Ark. 1909), see also Cal. Civ. Code § 1217 ("An unrecorded instrument is valid as between the parties thereto and those who have notice thereof.").

Second, Huber and her mother and two daughters resided on the Property until its sale. The daughters occasionally locked there bedroom doors in the main house, and her mother nearly always locked

the door to the guest house, where she resided. Thomas assertedly had no keys to any of these locks.

Huber's occupancy of the Property with her family was insufficient to put a prudent person on inquiry notice. The Hubers did not enjoy exclusive possession of the Property because Thomas lived with them. Further, Thomas' extra-marital relationship with Huber gave the appearance that he and the Hubers were living together as one family. that the daughters occasionally locked their bedroom doors was in accord with this image because such conduct is consistent with the privacy desires of family members. Although the mother had the only keys to the guest house, this too is consistent with a reasonable family living arrangement.

Third, Huber asserts that the documentary transfer tax cited in the Huber deed was grossly inadequate give the

net value of the Property. The deed states that the transfer of title from Huber to Thomas cost $15.40 in transfer tax. The BAP properly rejected this argument, in part, because "the documentary transfer tax disclosure does not provide clear evidence of inadequate consideration." In re Thomas, 147 B.R., 526, 530 n.6 (9th Cir. 1992). We agree. The record does not clearly identify the relationship between a transfer tax and the consideration paid for a parcel of property, such that a reasonable person would have been on inquiry notice.

AFFIRMED.

APPENDIX B

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

BAP No. CC-91-1889-VPMe

BK. No. LA88-24491-SB

Adversary No. AD 90-02331

In re LANCE E. THOMAS,

Debtor.

EVA M. HUBER,

Appellant,

v.

CURTIS B. DANNING, Trustee,

Appellee.

Argued and Submitted February 19, 1992

at Pasadena, California

Filed: December 3, 1992

Appeal from

the United States Bankruptcy Court
for the Central District of California
Honorable Samuel Bufford,
Bankruptcy Judge, Presiding

Before: Volinn, Perris, and Meyers,
Bankruptcy Judges

PERRIS, Bankruptcy Judge:

Appellant Eva Huber ("Huber") appeals the bankruptcy court's summary judgment avoiding, under 11 U.S.C. § 544(a)(3),[1] Huber's interest in real property to which she held record title at the time of debtor Lance Thomas's bankruptcy filing and declaring that the debtor's Chapter 7 trustee, Curtis B. Danning ("the Trustee"), holds free and clear the proceeds from the sale of the property.

---

[1] All section references are to be Bankruptcy Code, 11 U.S.C. §§ 101, et seq., unless the context otherwise indicates.

We AFFIRM the bankruptcy court's decision.

FACTS

In July 1988, Huber resided at 2861 Club Drive, Los Angeles, California ("the property"), which, according to Huber's representations, was worth approximately $850,000 and encumbered by liens totalling approximately $500,000. The property was a single family residential dwelling with a separate guest house in the back. At all pertinent times, the debtor lived at the property with Huber, the two being involved in an extra-marital relationship. The debtor, Huber and her two teenaged daughters lived in the main house on the property and Huber's mother lived in the guest house.

On August 1, 1988, Huber executed a grant deed which purported to convey the property to the debtor ("the Huber deed"). The debtor testified that Huber executed the grant deed in exchange for his promise

that he and Huber would live on the property until the two daughters had graduated from high school. Huber contends that she executed the grant deed, which the debtor promised not to record, as security for the debtor's loan to her of approximately $26,000. Huber was to repay the loan in $2,500 monthly installments under the terms of an August 10, 1988 lease agreement pertaining to the property. The lease agreement identifies as the landlord Howard Gunderson, a real estate broker and friend of the debtor, who had loaned the debtor nearly $200,000. Unbeknownst to Huber, on August 10, 1988, the debtor executed a grant deed which purported to convey the property to Gunderson. Gunderson never recorded the deed.

On November 21, 1988, Thomas filed his bankruptcy petition without listing either the property or any other assets on his bankruptcy schedules. The Trustee

filed a no asset report on January 23, 1989, and the court closed the case on April 11, 1989.

Meanwhile, on January 25, 1989, the debtor recorded the Huber deed and executed another grant deed purporting to convey the property to Gunderson, which Gunderson recorded on January 27, 1989. After Huber contacted a real estate agent for the purpose of listing the property for sale, she learned that Gunderson held the record title to the property. Huber then filed an action against Gunderson in state court seeking the imposition of a constructive trust on the property and any proceeds therefrom. Huber subsequently entered into a compromise with Gunderson and Thomas regarding the distribution of the proceeds of the proposed sale at a price of $930,000.

Huber learned of the debtor's bankruptcy case during the state court proceeding. After Huber notified the

Trustee that she intended to close the sale of the property, he requested, and the bankruptcy court ordered the reopening of the case on August 7, 1989. Pursuant to a stipulation dated August 24, 1989 and an order thereon, the Trustee sold the property to a third party and the interests of the Trustee, Huber and Gunderson attached to the net proceeds of the sale, $250,000.[2]

Huber commenced an adversary proceeding to impose a constructive trust on the proceeds. The Trustee filed a cross-complaint seeking the avoidance of Huber's interest in the property under section 544(a)(3) and a declaratory judgment that the Trustee holds the proceeds free and clear of Huber's interest. The bankruptcy court granted

---

[2] In December of 1989, the Trustee prevailed in his adversary proceeding seeking to avoid Gunderson's interest in the proceeds.

summary judgment in favor of the Trustee on both claims for relief. Huber filed this timely appeal.

ISSUES

The ultimate issue in this appeal is whether the bankruptcy court erroneously avoided Huber's interest in the property under section 544(a)(3). Our resolution of this issue turns upon the following to sub-issues:

1. Whether section 544(a)(3) may be used to avoid any interest in the property that Huber may hold as beneficiary of a constructive trust.

2. Whether the bankruptcy court correctly determined that the Trustee lacked constructive notice of Huber's interest in the property.

STANDARD OF REVIEW

We review de novo the bankruptcy court's decision to grant summary

judgment. See In re Marino, 813 F.2d 1562, 1564-65 (9th Cir. 1987). In this regard we must view the evidence in a light most favorable to the nonmoving party and determine whether there are any genuine issues of material fact and whether the bankruptcy court correctly applied the relevant substantive law. Id.

DISCUSSION

1. Whether section 544(a)(3) may be used to avoid any interest in the property that Huber may hold as beneficiary of a constructive trust.

Under section 544(a)(3), a trustee may avoid any transfer of property or obligation that would be avoidable under state law by a bona fide purchaser of real property, whether or not such a bona fide purchaser actually exists.[3]

---

[3] Section 544(a)(3) provides, in pertinent part, as follows:

(a) The trustee shall

Huber contends that section 544(a)(3) cannot apply to avoid her claimed interest because that section allows the avoidance of transfers and in this case there has been no transfer by the debtor to which section 544(a)(3) can apply. We find Huber's contention unpersuasive. Ninth

---

> have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by-- . . .
>
> (3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.

Circuit authority makes clear that without regard to whether the defendant is the recipient of a transfer from the debtor, section 544(a)(3) allows a trustee to avoid the defendant's equitable interest in property. See In re Seaway Express Corp., 912 F.2d 1125 (9th Cir. 1990); In re Tleel, 876 F.2d 769 (9th Cir. 1989). In rejecting a similar contention, the court in Seaway Express stated: "Although the section empowers the trustee to avoid transfers, by its terms it also applies if no transfer has taken place." 912 F.2d at 1129-1130.

In this case, at the time the debtor filed his bankruptcy petition, he held an unrecorded grant deed to the property, by virtue of which the estate had an interest in the property. Huber claims an equitable interest in the property arising from the circumstances surrounding the execution of the grant deed. Despite the fact that Huber did not obtain her

interest in a transfer from the debtor, cases such as Seaway Express and Tleel make clear that section 544(a)(3) applies to the Trustee's attempts to avoid her interest.

Huber also argues that section 544(a)(3) cannot apply because the property is impressed with a constructive trust and, as such, it is not property of the estate under section 541(d), to which a trustee's avoidance powers may apply. While some case authorities support Huber's contentions, see In re Quality Holstein Leasing, 752 F.2d 1009, 1013 (5th Cir. 1985), the Ninth Circuit has specifically rejected this reasoning.[4]

---

[4] The dissent relies upon In re Quality Holstein Leasing, 752 F.2d 1009 (5th Cir. 1985). Tleel and Seaway Express specifically rejected the reasoning of Quali Holstein Leasing and similar cases pertaining to the interplay between sections 541(d) and 544(a)(3). In attempting to reconcile the reasoning of Quality Holstein Leasing with Ninth

See Seaway Express, 912 F.2d at 1128-29; Tleel, 876 F.2d at 772-73. Under the law in this circuit, section 541(d) does not stand as a bar to the avoidance of an equitable interest, including a constructive trust interest, in real property under section 544(a)(3). Id. Rather, section 544(a)(3) allows the trustee to avoid such interests to the same extent that they could be avoided by a bona fide purchaser under state law.

Under California law, a bona fide purchaser without actual or constructive notice takes free of a prior equitable interest or constructive trust interest. Rafftery v. Kirkpatrick, 29 Cal. App. 2d 503, 507-508, 85 P.2d 147, 150 (1938); see Tleel, 876 F.2d at 771-72. Section 544(a)(3) makes a trustee's actual knowledge irrelevant. See Tleel, 876 F.2d at 772. Constructive notice, however,

---

Circuit authority, we believe that the dissent reads these cases too broadly.

will preclude avoidance under section 544(a)(3). In re Probasco, 839 F.2d 1352, 1354-55 (9th Cir. 1988). Whether the Trustee can avoid Huber's constructive trust interest[5] in the property under section 544(a)(3), therefore, turns upon whether the Trustee had constructive or inquiry notice of that interest.

2. Whether a disputed issue of material fact precluding summary judgment exists on the question of whether the Trustee lacked constructive notice of Huber's interest in the property.

Huber argues that under California law the Trustee would not prevail as a bona fide purchaser because he had constructive notice of Huber's equitable interest in the property. Huber argues

---

[5] As did the bankruptcy court, for purposes of our decision, we will assume without deciding that a constructive trust arose from the circumstances surrounding the execution of the grant deed.

that such constructive notice was provided by the fact that she lived on the property along with her mother and her daughters, who usually locked the doors to their rooms, and by the fact that the real property records on the date of the petition indicated that Huber held record title.[6]

---

[6] In arguing that the deed form Huber to the debtor was intended as security rather than an outright transfer, Huber contends that a factor in that determination is that the documentary transfer tax reflected on the deed evidences a "sale price" considerably less than the value of the property. While Huber does not contend that this factor provides constructive notice of her interest, such gross inadequacy of consideration has been a factor considered by some courts in making a constructive notice determination. See Asisten v. Underwood, 183 Cal. App. 2d 304, 310, 7 Cal. Rptr. 84, 87 (1960). Because Huber did not raise this issue in the bankruptcy court and because the documentary transfer tax disclosure does not provide clear

A party has constructive or inquiry notice of another's interest in property when he or she has knowledge of circumstances or a condition of the property that would prompt a prudent person to inquire about the other's interest and the prosecution of the inquiry would have revealed the other's interest. See Cal. Civ. Code § 19 (West 1982); 3 Harry D. Miller & Marvin B. Starr, California Real Estate §§ 8:62, 8:63, 8:65 (2d ed. 1989) (hereafter "Miller & Starr"). Proper recordation of an interest in real property imparts constructive notice of that interest. E.g., 4 B. E. Witkin, Summary of California Law Real Property § 203 (1987). In addition, possession or occupancy of real property that is open, notorious,

---

evidence of inadequate consideration, we decline to rely upon this factor in determining whether the Trustee had constructive notice of Huber's interest.

exclusive and inconsistent with the title to the property provides constructive notice of the occupant's interest in the property. E.g., Claremont Terrace Homeowners' Ass'n v. United States, 146 Cal. App. 3d 398, 408, 194 Cal. Rptr. 216, 222 (1983); Miller & Starr, §§ 8:65-8:66; see Probasco, 839 F.2d at 1354-56. Such possession obliges a purchaser to inquire into the possessor's interest and provides constructive notice of the facts that would be revealed by such an inquiry. Id.

Turning to the facts of this case, as of the date of the petition, the debtor had an unrecorded grant deed from Huber. The fact that the deed was not recorded did not prevent the debtor from taking legal title to the property and would not prevent the debtor from conveying title to a bona fide purchaser, unless the circumstances would provide a purchaser with constructive notice of Huber's

interest.[7]

The fact that the debtor failed to record the Huber deed prior to the petition and Huber, therefore remained the title holder in the real property records is not, by itself, sufficient to impart constructive notice of Huber's interest. A prudent purchaser would see that the debtor held a deed from the record title holder. That the deed was not recorded is

---

[7] The dissent places great reliance on the fact that the deed from Huber to the debtor was not recorded. The dissent, however, cites no authority suggesting that a party's interest in real property must be recorded before that interest may be conveyed to a bona fide purchaser.

Similarly, the fact that the debtor conveyed the property to Gunderson by an unrecorded deed prior to the petition would not prevent the debtor from conveying the property to a bona fide purchaser. The authorities discussed above would protect a bona fide purchaser from any interest Gunderson obtained through the prior unrecorded sale.

not, by itself, a suspicious circumstance requiring investigation or imparting constructive notice. See Beebe Stave Co. v. Austin, 92 Ark. 248, 122 S.W. 482, 484 (1909); 77 Am. Jur. 2d Vendor and Purchaser § 665 (1975).

A more difficult question is whether the circumstances surrounding Huber's occupancy of the property, along with the occupancy of her mother and daughters, provides constructive notice of her interest. The difficulty lies in determining whether, in light of the fact that the debtor also resided on the property, this occupancy is consistent with the debtor's title to the property. If such possession is consistent with the debtor's title then it will not raise the duty to inquire or impart constructive notice. See Three Sixty Five Club v. Shostak, 104 Cal. App. 2d 735, 738, 232 P.2d 546, 548 (1951); Miller & Starr, § 11:55.

Many courts have determined that when the title holder jointly occupies property with a stranger to title claiming an interest in the property, the occupancy by the transfer to title does not provide constructive notice of his or her interest. Rafftery v. Kirkpatrick, 29 Cal. App. 2d 503, 506, 85 P.2d 147, 149-150 (1938); Campbell v. Grennan, 13 Cal. App. 481, 483, 110 P. 156, 157 (1910); Miller & Starr, § 11:60; Rankin v. Coar, 46 N.J. Eq. 566, 22 A. 177, 178-79 (1890); see Kane v. Huntley Financial, 146 Cal. App. 3d 1092, 194 Cal. Rptr. 880 (1983). In such circumstances, the law regards possession as being with the title holder and there is no presumption of an interest of the joint occupant inconsistent with the title in the other joint occupant. See Campbell v. Grennan, 110 P. at 157; Cameron v. Romele, 53 Tex. 238, 244 (1880). This general rule is often applied when the joint occupants are

related to one another. See, e.g., Kirgan v. Kirgan, 123 Mont. 34, 207 P.2d 557 (1949). Similarly, this general rule has also been applied when, as in this case, the grantor is a joint occupant with the grantee. See Swanstrom v. Day, 46 Misc. 311, 93 N.Y.S. 192, aff'd without op., 101 App. Div. 609, 92 N.Y.S. 1147 (1905).

In this case, Huber and her relatives jointly occupied the property with the debtor, who also held the title to the property. Huber's occupancy, along with that of her relatives, is not inconsistent with the debtor's title. Given the fact that Huber and the debtor were living together in an extra-marital relationship, a reasonable person viewing the property would see what amounted to a family type of living arrangement that was entirely consistent with the debtor being the owner of the property. The fact that Huber's daughters and mother often locked the doors to their rooms would not alter this

conclusion because it is not unusual that members of a family may limit the access of other family members to particular parts of a residence. Such limitations are not the same as when unrelated parties separately and exclusively occupy different parts of real property. Such limitations are consistent with a family or quasi-family living arrangement and would not excite suspicion or raise a duty to inquire.

Moreover, even if a duty to inquire would be raised by the locked rooms, an inquiry would disclose that Huber's mother and daughters occupied the locked portions of the property, which, as discussed above, was entirely consistent with the debtor's title. In addition, if a prudent purchaser was told that Huber owned the property upon making inquiry of the occupants of the locked rooms, a prudent purchaser would then see that Huber had, by the deed in question, conveyed her

interest to the debtor. What would be disclosed by the inquiry would be consistent with the debtor's title under the circumstances of this case.

The crucial question in this appeal is whether a prudent purchaser would, under the circumstances of this case, be required to question Huber concerning title to the property. For the reasons set forth above, we believe that a prudent purchaser would not be required to question Huber and that the facts of this case would not impart constructive notice to a bona fide purchaser or to the trustee.[8]

---

[8] We disagree with the dissent's contention that there is a disputed issue of material fact on this question. The essential facts which, Huber contends, impart constructive notice are not in dispute. The only question is whether those undisputed facts are sufficient to impart notice.

We also disagree with the dissent's reliance upon In re Professional

CONCLUSION

Because the Trustee lacked constructive notice of any interest in the property that Huber may hold as beneficiary of a constructive trust, the Trustee may avoid that interest pursuant to section 544(a)(3).[9] We therefore AFFIRM bankruptcy court's summary judgment in favor of the Trustee.

Investment Properties, 955 F.2d 623 (9th Cir.), cert. denied, ____ U.S. ____, 113 S.Ct. 63 (1992), for the proposition that the bankruptcy petition provided constructive notice to the trustee of Huber's interest. In this case, unlike Professional Investment Properties, the petition made no mention of Huber's interest in the property.

[9] Because we determine that the Trustee may avoid any interest held by Huber under section 544(a)(3), we need not and do not address the contention that the postpetition recordation of the Huber deed cuts off any interest that Huber may claim in the property.

VOLINN, Bankruptcy Judge, dissenting:

FACTUAL AND PROCEDURAL BACKGROUND[1]

In July 1988, appellant Eva Huber (Huber), her two teenaged daughters, and her mother resided in Los Angeles at their home, known as the Club Drive property, which was valued at approximately $850,000. There were liens against the property totaling approximately $500,000. Huber and her daughters lived in the house and her mother lived in a separate dwelling at the rear of the property. Huber met the debtor, Lance Thomas (Thomas), a buyer, seller, and repairman of vintage watches. According to Thomas, they became lovers and he moved into the Club Drive property.

On August 1, 1988, Huber executed a

---

[1] This is a summary judgment proceeding brought on by the trustee and the statements of the party moved against (Huber) are to be taken as true. In re New England Fish Co., 749 F.2d 1277, 1280 (9th Cir. 1984).

grant deed on the property to Thomas. In deposition testimony, Thomas asserted that Huber gave him the grant deed in exchange for his promise that he and Huber would live on the property until the two daughters had graduated from high school. Huber states that she intended to give Thomas a security interest in the property in exchange for a loan of $26,000. Thomas promised not to record the deed.

Unbeknownst to Huber, Thomas, on August 10, 1988, within days after obtaining the deed from her, executed a grant deed of the property to Howard Gunderson. Gunderson was a real estate broker, business associate, and friend of Thomas, from whom Thomas had allegedly borrowed approximately $245,000 for the purpose of forming and promoting a company to conduct harness racing in California. The consideration for the deed was the alleged $245,000 debt owed by Lance to Gunderson. Gunderson also did not record

this deed. On August 10, 1988, Gunderson and Thomas entered into a lease agreement by which Thomas as lessee was to pay $2,500 per month for the Club Drive property. Huber was not a party to the lease.

On November 21, 1988, Thomas, having taken title to and disposed of Huber's property, filed his bankruptcy petition without listing either the Club Drive property or any other assets on his bankruptcy schedules. The trustee's no asset report was filed on January 23, 1989, and the case was closed on April 11, 1989. Two days after the no asset report was filed, on January 25, 1989, Thomas recorded the August 1, 1988 grant deed from Huber. On the same day he executed another grant deed to Gunderson, which Gunderson recorded on January 27, 1989.

In January 1989, Huber contacted a real estate agent for the purpose of listing the Club Drive property for sale.

While checking the property for liens, the agent learned and informed Huber that Gunderson held record title to the property. Thereafter, Huber retained counsel and commenced an action in state court against Gunderson to set aside his deed. Ultimately she entered into a compromise with Gunderson and Thomas relative to the distribution of the proceeds from a proposed sale at a price of $930,000. Huber's attorney also contacted Thomas's bankruptcy trustee relative to the sale of the property. The trustee moved to reopen the bankruptcy case; an order to reopen was entered on August 7, 1989, and a trustee was reappointed. Eventually the property was sold, and pursuant to stipulation, the claims of the various parties attached to the $250,000.00 net sale proceeds.

The trustee proceeded with an action in bankruptcy court to set aside Gunderson's claim of interest in the

property and was granted summary judgment on December 18, 1990. The trial court held that the claim of the estate to Huber's net proceeds was paramount to that of Huber.

The following chronology outlines the shifting status of record title:

August 1, 1988: Huber deeds to Thomas. The deed is not recorded at this time.

August 10, 1988: Thomas deeds the property to Gunderson. the deed was not recorded.

November 21, 1988: Thomas files bankruptcy. The Club Drive property is not listed in the schedules. Thomas, in a deposition taken by the trustee, stated that he did not list the property because

	ninety days had gone by since the original transfer.
January 23, 1989:	The trustee files a no asset report.
January 25, 1989:	Thomas executes a second deed in favor of Gunderson.
January 27, 1989:	Gunderson records the January 25 deed.
Feb. 24, 1989:	Huber, having discovered Gunderson's recorded deeds in the course of a prospective sale of the property, institutes a state court action to recover the property.
Feb. 27, 1989:	Huber records Notice of Pending Action relating to above suit with office of L.A.

	County Recorder.
August 7, 1989:	Trustee reopens case.
Dec. 8, 1990:	Trustee obtains summary judgment avoiding Gunderson's deed and vesting title to the property in the estate.

ISSUES

As indicated by the majority, there are two issues: First, whether the strong-arm clause, 11 U.S.C. §544(a)(3), may be used to avoid Huber's interest in the property, and second, whether the bankruptcy court correctly determined that the trustee did not have constructive notice of Huber's interest in the property.

I. APPLICABILITY OF SECTION 544(a)(3)

This section provides in pertinent part as follows:

(a) The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by--. . .

(3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.

As can be seen from the foregoing summary of events affecting title, on the date of bankruptcy, the trustee had no interest in the property. Ultimately, Gunderson, as a

result of the dealings with Thomas, became vested with record title. While the ostensible transfers resulted from Thomas's betrayal of Huber, and subject to question by her, they were effective as to the trustee until he avoided them as to Gunderson. It was only as the result of the trustee's post-bankruptcy action against Gunderson that the latter's interest was avoided and vested in the trustee. At this point, after the commencement of bankruptcy, the trustee took title to the property in place of Gunderson.

It should be noted that Huber's claim is essentially that Thomas, by holding the deed as security, held only bare legal title as against her substantial equitable interest. The trustee was presumably in the same position, holding an unrecorded deed of trust on the date of bankruptcy. Gunderson, who claimed through Thomas, certainly knew of Huber's prior claim of

paramount interest.

Section 541(d) provides that:

> Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest, . . . becomes property of the estate under subsection (a)(1) or (2) of this section only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold. (emphasis supplied)

Since this proceeding has been presented in the context of motion for summary judgment, Huber's statement that she deeded the property to Thomas to secure a $26,000.00 debt must be taken as true. Common sense also supports the statement. Thus, as to the security interest claimed by the trustee under

Thomas's deed, the language of section 541(d) exempts Huber's equitable interest from the reach of the trustee and his strong-arm powers under section 544(a)(3). While some motivation for enactment of the foregoing section has been ascribed to concern for abuse of servicing agreements in secondary mortgage market transactions, the specific language of the statute is so broad that reducing it to a specialized limitation would be to characterize a general principle, but only one of many specific applications.

In the legislative history, it appears that the language of section 541 was intended to be generally applicable:

> ... As section 541(a)(1) clearly states, the estate is comprised of all legal or equitable interests of the debtor in property as of the commencement of the case. To the extent such an interest is limited in the

> hands of the debtor, it is equally limited in the hands of the estate except to the extent that defenses which are personal against the debtor are not effective against the estate . .
>
> .

124 CONG. REC. S17413 (daily ed. Oct. 6, 1978) (remarks of Sen. DeConcini).

This view reflects case law prior to the enactment of the present Bankruptcy Code. Those cases generally held that pursuant to section 70 of the Bankruptcy Act, the pre-Code analogue to section 541, the trustee took the property with its burdens. There is a discussion of this issue and cases supporting the foregoing conclusion in In re Quality Holstein Leasing, 752 F.2d 1009 (5th Cir. 1985). That case held that a party who was not the immediate victim of fraudulent debtor could not claim a constructive trust. At page 1015, the court stated: "[o]ne who

claims an interest in estate property through the beneficiary of a constructive trust, in other words, may not thus avoid the trustee's strong-arm powers." The court engaged in considerable discussion as to the interplay of section 541 and 544, stating:

> We agree with Borg-Warner that section 544 does not entitle a trustee to retain for the benefit of the estate all property regardless of the means -- fair or foul -- by which the debtor obtained it. . . .
>
> We start with the proposition that imposition of a constructive trust under state law upon a bankruptcy debtor's property generally confers on the true owner of the property an equitable interest in the property superior to the

trustee's. As we recently stated in construing section 541(d):

> With regard to property held by [a] trustee, "[t]he rule is elementary that the estate succeeds only to the title and rights in the property that the debtor possessed, although the trustee is armed, of course, with the special rights and powers conferred upon him by the Code itself. Therefore . . . , the estate will generally hold such property subject to the outstanding interest of the beneficiaries."

Georgia Pacific Corp. v. Sigma Service Corp., 712 F.2d 962, 968 (5th Cir. 1983). (citation omitted)

Quality Holstein Leasing, 752 F.2d at 1012.

The court further stated:

As a general rule, it must be held that section 541(d)

> prevails over the trustee's strong-arm powers. Although those powers allow a trustee to assert rights that the debtor itself could not claim to property, Congress did not mean to authorize a bankruptcy estate to benefit from property that the debtor did not own. Where state law impresses property that a debtor holds with a constructive trust in favor of another, and the trust attaches prior to the petition date, the trust beneficiary normally may recover its equitable interest in the property through bankruptcy court proceedings.

Id. at 1013-1014.

The court in In re N.S. Garrott & Sons, 772 F.2d 462, 467 (8th Cir. 1985) followed In re Quality Holstein Leasing.

In N.S. Garrott, an escrow fund that was technically property of the Chapter 11 debtor's estate was held to be subject to a constructive trust in favor of an intended beneficiary of the fund. The court, citing section 541(d), concluded:

> So, while we agree with the district court that the entire fund is technically property of the estate, we cannot agree that the debtors' interests in the main funds are unlimited. Since the estate cannot acquire greater interests than those which the debtors had, we conclude that the estate holds the main fund, . . . subject to the equitable interests of others. As such the bankruptcy court is bound to recognize those equitable interests.

Id.

Under state law, Huber would be

entitled to a hearing on her contention that the deed, while absolute on its face, was in fact a deed of trust and that she had a considerable equitable interest in the property. See Beeler v. American Trust Company, 140 P.2d 814, modified on other grounds, 24 Cal. 2d 1, 147 P.2d 583 (1944); General Casualty Company v. Soda, 184 Cal. App. 2d 390, 393; 7 Cal. Rptr. 536, 539 (1960); Glasgow v. Andrews, 129 Cal. App. 2d 660, 664, 277 P.2d 400, 403 (1954). It should be noted in this connection that the house sold for approximately $900,000 and that the liens, charges against it, and expenses of sale resulted in a net of some $250,000. The most that Thomas ever advanced[2] was $26,000 or ten percent of the net proceeds. Thus Huber was euchred out of all she had, and according to the record, rendered destitute with her mother on

---

[2] The record indicates that it may be substantially less.

welfare.

There is a considerable body of law which differs from the cases represented by Holstein. A recent case expressing an opposing view is Belisle v. Plunkett, 877 F.2d 512 (7th Cir. 1989). That case discusses in some detail the differences in concept and concludes that "The estate gets what the debtor could convey under local law rather than only what the debtor owned under local law -- a critical distinction that the Fifth Circuit did not mention [in Holstein]." Belisle, 877 F.2d at 516. This distinction, assuming its validity, does not apply in the instant case because the debtor had conveyed the property to Gunderson prior to bankruptcy. By the time the trustee reopened the estate and placed himself in Gunderson's shoes, he was bound by notice of Ms. Huber's ownership of the property. In any event, as will be discussed below, there was constructive notice of interest at all

relevant times.

The majority has cited two cases which it reads to be as consistent with Belisle: In re Tleel, 876 F.2d 769 (9th Cir. 1989), and In re Seaway Express Corp., 912 F.2d 1125 (9th Cir. 1990). In Tleel, the equitable interest claimed by the creditor was a partnership interest. While holding that section 544(a)(3), on the facts before it, would override the reservation in favor of the equitable interest set forth in section 541, there is language which does not foreclose giving the equitable interest a right of way over section 544(a)(3) in an appropriate situation. The court stated:

> Chbat's contention that under section 541(d) all beneficial or equitable owners of property may exempt their property from the debtor's estate in all circumstances, notwithstanding the debtor's

> legal title and the avoidance powers of section 544, goes too far. This interpretation would open the door to allegations of secret deals resulting in constructive trusts and thereby shelter some unsecured claims from avoidance. This result was not intended by the Bankruptcy Code and is contrary to the policy goal of ratable distribution among creditors.

Tleel, 876 F.2d at 773 (emphasis supplied).

As previously pointed out, under California law, the debtor would be permitted to show that there was, in effect, an actual trust with the debtor holding only bare legal title.

The "ratable distribution" case was In re North American Coin & Currency, Ltd., 767 F.2d 1573 (9th Cir. 1985). In that case, the court rejected a claim of

equitable interest in deposits for coins because of the similar nature of the trust claimant and the bulk of the debtor's creditors. Obviously, in this case, Huber's claim is unique.

In Seaway, supra, the equitable claimant was a bank that was attempting to trace the proceeds of accounts receivable (in which the bank had a secured interest) that had gone to purchase real estate. The court pointed out that subsequent bona fide purchasers would have no actual or constructive notice of the equitable claim of constructive trust with respect to the subsequently acquired real estate; that the Uniform Commercial Code and the collateral subject to its provisions does not extend to real property; and under Washington State law, that a bona fide purchaser of real property who buys without notice cuts off any potential constructive trust. The court discussed cases on both sides of the issue,

including Holstein, which it characterized as a minority view, and Belisle, which it characterized as representing the majority rule, and which it chose to follow in Seaway.

However, as in Tleel, the court in Seaway referred to the standard of "ratable distribution" as articulated in the North American Coin case. Here, the notion of ratable distribution which implies some similarity of condition between Huber and Thomas's remaining creditors (including Gunderson) is inapposite. In any event, it is apparent that cases in this area vary considerably based on individual facts and equities.

CONSTRUCTIVE NOTICE

A. The presence of the Huber family on the premises.

It is admitted that the two teenage daughters lived on the premises and that they kept their rooms locked a substantial

amount of the time. Huber's mother was in a separate dwelling house and she kept her premises locked most of the time. She had her own key. Thomas had no key to these premises. On these facts, any bona fide purchaser would want to examine the entire premises and would be bound to find the doors locked, and to learn that Thomas had no key. In addition, Huber herself was on the premises. A bona fide purchaser viewing all these circumstances, looking at the three generations living independently on the premises and exercising a good deal of dominion over where each of them lived, would have some concern as to the nature of Thomas's ostensible ownership. Such a buyer would be on inquiry notice. The Huber family was available for such inquiry. The mother and the daughters would have stated, consistent with Huber's declaration, that Thomas did not own the property. A bona fide purchaser or

property of substantial value would, in the ordinary course, check the record title, and having done so under all the foregoing circumstances, should have concluded that the unrecorded deed in Thomas's hands was subject to question. This issue was considered in In re Probasco, 839 F.2d 1352 (9th Cir. 1988), in which the court stated:

> Actual or constructive notice of a prior unrecorded transfer removes a subsequent purchaser from the protection of the recording acts. Clear and open possession of real property constitutes constructive notice of the rights of the party in possession to subsequent purchasers. Such a prospective purchaser must inquire into the possessor's claimed interests, whether equitable or legal (citations omitted). Therefore,

> a bona fide purchaser who records does not take priority over one in clear and open possession of real property
>
> . . . .
>
> [Section 544(a)(3)] does not, however, make irrelevant notice constructively given by open possession any more than it would make irrelevant the constructive notice given by recorded instruments that might evidence a competing claim of title to the real property in question.

Id. at 1354-1355.

As indicated, the mother was in clear and open possession of a distinct and separate part of the property, a fact which called for inquiry. Had the record been checked by a bona fide purchaser, it would have shown that the deed that was being displayed by Thomas was not recorded

and that the record title was held by Huber. Notice of such circumstance would have been binding, as in In re Gurs, 27 B.R. 163 (9th Cir. BAP 1983). In that case, the court held that a trustee could not prevail under section 544(a)(3) because he was bound by a notice of lis pendens.

With all these red flags evident, a bona fide purchaser from Thomas would have been bound to inquire as to the combination of apparent anomalies, that is, lack of record title, the absence of a legal relationship between debtor and the Hubers, and lack of exclusive possession. On these facts, inquiry was in order. Had it been made, the purchaser would have learned from Huber or her mother or daughters that the true owner of the property, as shown by the record, was Huber.

B. The trustee, by virtue of the bankruptcy proceedings, had actual

and constructive notice.

As discussed earlier, the trustee was a stranger to the title as to the subject property until December 1989 when the Gunderson deeds were invalidated.[3] The deed from Thomas to Gunderson was not void. It was voidable and, until the avoidance, Gunderson held the title. That is why Huber began by filing an action against Gunderson and Thomas in state court. The bankruptcy was filed over a year prior to the voiding of the Gunderson lien. Under these circumstances, the case of In re Professional Inv. Properties of America, 955 F.2d 623 (9th Cir. 1992) is applicable. In that case, the debtor borrowed $50,000 from Briggs and gave him a note and a deed of trust that was not recorded. Briggs, learning that the

---

[3] The original deed to Thomas was dated August 1, 1988. He first deeded to Gunderson on August 10, 1988. Bankruptcy was originally filed on November 21, 1988.

debtor was in financial difficulty, filed an involuntary bankruptcy petition against him on May 28, 1986. He also filed a motion for the appointment of a trustee. Briggs unsuccessfully attempted to impose an equitable lien on the proceeds of an anticipated sale of the property, which was denied.

There was a question as to whether the trustee had constructive notice of Briggs's unrecorded mortgage. Briggs presented expert testimony that the contents of the petition constituted constructive notice of the Briggs' interest in the real property. The court reviewed the terms of section 544(a)(3) and discussed cases under that statute addressing the rights of a bona fide purchaser for a value in the state of Washington. The court stated that this case turned on whether the bankruptcy petition itself put the trustee on sufficient inquiry or constructive notice

of Briggs's prior security interest. Id. at 627. The court found that a diligent title search would have disclosed the bankruptcy filing. The court pointed out that the involuntary petition revealed that the holder of the note and deed was specifically mentioned in the involuntary bankruptcy petition and that the security interest, in the form of deeds of trust, was also referenced. Id. at 629. The court reasoned that because the involuntary petition set forth that the parties who initiated the bankruptcy proceedings held a deed of trust, there was at least inquiry notice; in other words, the petition which brought about the trustee's existence gave him notice of the lien claim. Id. In the present case, the trustee in the re-opened case had no interest in the property until the Gunderson lien was avoided. The acquisition of that interest was attended by the knowledge of Huber's outstanding

claim to the property.

CONCLUSION

Huber's brief encounter with Thomas was disastrous for herself and her family. The record shows, if her statements are taken as true, that she was deceived and defrauded for the benefit of Thomas and Gunderson and that no creditor of Thomas other than Gunderson was involved with or could have relied on his brief pre-bankruptcy claim of interest in the Club Drive property. The notion of ratable distribution, under these circumstances, is inapplicable. Even if section 544(a)(3) may, as a general principle, override section 541(d), under the circumstances of this case, there was sufficient constructive notice presented to any bona fide purchaser by virtue of the presence of the Huber family on the premises and the condition of record title. At the very least, summary judgment depriving them of a factual

exploration of this issue was not warranted. In any event, the record which gave the trustee standing to pursue an interest in the property provided him with notice, under any standard, of Huber's basic claim of interest in the property.

I, therefore, respectfully DISSENT.

APPENDIX C

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

Bk. No. LA 88-24491 SB

Adv. No. LA 90-02331 SB

Chapter 7

In re LANCE E. THOMAS,

Debtor.

EVA M. HUBER

Plaintiff,

vs.

LANCE E. THOMAS; HOWARD GUNDERSON; AND CURTIS B. DANNING, Chapter 7 Trustee,

Defendants.

CURTIS B. DANNING, Trustee,

Counter-Complainant,

vs.

EVA M. HUBER, an individual,

Counter-Defendant.

SUMMARY JUDGMENT IN FAVOR OF TRUSTEE

ON ALL CLAIMS FOR RELIEF

[Filed August 14, 1991]

[Entered August 21, 1991]

DATE: July 16, 1991

TIME: 2:00 P.M.

PLACE: COURTROOM 8541

AT LOS ANGELES, IN THIS DISTRICT, ON 8/14, 1991.

On July 16, 1991, at 2:00 p.m., the court heard and considered the Motion for Summary Judgment on All Claims for Relief (the "motion") submitted by defendant and counter-complainant Curtis B. Danning, the Chapter 7 trustee for the above-mentioned debtor's estate (the "Trustee"), the Honorable Samuel L. Bufford, United States Bankruptcy Judge, presiding. Appearing for the Trustee was Danning, Gill, Gould, Diamond & Spector by Eric P. Israel and Mark M. Sharf; appearing for plaintiff and

counter-defendant Eva M. Huber ("Huber") was the Pagter Law Corporation by R. Gibson Pagter, Jr.; no other appearances were made.

The court having reviewed all of the moving and opposing papers, all of the other pleadings on file in this adversary proceeding and the debtor's case, as well as those in adv. no. LA 90-01564-SB, having heard the oral arguments of counsel and being fully informed, good cause appearing, it is

ORDERED, ADJUDGED AND DECREED THAT:

1. The motion is granted in its entirety.

2. Judgment is granted in favor of the Trustee and against Huber on both of the Trustee's counter-claims for relief herein.

3. It is hereby declared that the proceeds of the sale of real property at 2861 Club Drive, Los Angeles, California, and all other funds held by the Trustee,

are free and clear of any interest of Huber. The court makes no determination at this time on any rights that Huber may have to file an unsecured proof of claim against the estate.

4. Judgment is granted in favor of the Trustee and against Huber on Huber's First Claim for Relief. Huber's Second Claim for Relief does not involve the Trustee.

5. Huber's request for sanctions against Curtis B. Danning, both personally and as the Trustee, and against Mark M. Sharf is denied with prejudice.

6. The clerk of the court shall tax costs in favor of the Trustee as the prevailing party as provided by the Local Bankruptcy Rules.

/s/ Samuel L. Bufford
UNITED STATES BANKRUPTCY JUDGE

APPENDIX D

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

Bk. No. LA 88-24491 SB

Adv. No. LA 90-02331 SB

Chapter 7

In re LANCE E. THOMAS,

Debtor.

EVA M. HUBER

Plaintiff,

vs.

LANCE E. THOMAS; HOWARD GUNDERSON; AND CURTIS B. DANNING, Chapter 7 Trustee,

Defendants.

CURTIS B. DANNING, Trustee,

Counter-Complainant,

vs.

EVA M. HUBER, an individual,

Counter-Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW IN SUPPORT OF SUMMARY JUDGMENT IN FAVOR OF TRUSTEE

[Filed August 14, 1991]

[Entered August 21, 1991]

DATE: July 16, 1991

TIME: 2:00 P.M.

PLACE: COURTROOM 8541

AT LOS ANGELES, IN THIS DISTRICT, ON _____, 1991.

On July 16, 1991, at 2:00 p.m., the court heard and considered the Motion for Summary Judgment on All Claims for Relief (the "motion") submitted by defendant and counter-complainant Curtis B. Danning, the Chapter 7 trustee for the above-mentioned debtor's estate (the "Trustee"), the Honorable Samuel L. Bufford, United States Bankruptcy Judge, presiding. Appearing for the Trustee was Danning, Gill, Gould, Diamond & Spector by Eric P. Israel and

Mark M. Sharf; appearing for plaintiff and counter-defendant Eva M. Huber ("Huber") was the Pagter Law Corporation by R. Gibson Pagter, Jr.; no other appearances were made.

The court having reviewed all of the moving papers and those filed in opposition, all of the other pleadings filed in this adversary proceeding and the debtor's case, as well as those in adv. no. LA 90-01564-SB, having heard the oral arguments of counsel and being fully informed, good cause appearing, the court makes the following findings of fact and conclusions of law in support of its summary judgment in favor of the Trustee.

FINDINGS OF FACT

1. On November 21, 1988, Lance E. Thomas (the "debtor") filed a voluntary petition for relief under Chapter 7 of Title 11 of the United State Code (the "Code").

2. Curtis B. Danning was appointed the Chapter 7 Trustee for the debtor's estate on December 27, 1988.

3. On August 1, 1988, Eva M. Huber ("Huber") duly executed a grant deed (the "first deed") in favor of the debtor with respect to real property located at 2861 Club Drive, Los Angeles, California (the "subject property"). The subject property at all relevant times was a parcel of residential property improved with a single family dwelling. The first deed was recorded at the office of the Los Angeles County Recorder on January 25, 1989 as Instrument No. 89-139744.

4. On August 10, 1988, the debtor duly executed a grant deed in favor of Howard Gunderson ("Gunderson") concerning the subject property (the "second deed"). The second deed was never recorded.

5. On January 25, 1989, the debtor duly executed a second grant deed in favor of Gunderson with respect to the subject

property (the "third deed"). The third deed was recorded at the office of the Los Angeles County Recorder on January 27, 1989 as Instrument No. 89-146773.

6. Between at least June 1988 and January 1989, the debtor lived at the subject property with Huber, her mother and her two daughters. Throughout that period, the debtor and Huber were involved in an extra-marital relationship. The debtor continued living at the subject property thereafter until approximately September of 1989.

7. Throughout this time, the debtor had unlimited access to the entire property, except that Huber's two daughters would occasionally lock their bedroom doors, and Huber's mother, who lived in a guest house in the back of the residence, usually locked the door thereof.

8. While living on the subject property, the debtor made various physical

repairs to the residence and the guest house, including repairs to the roof. At least at those times, the debtor had access to the entire property.

9. On February 24, 1989, after the commencement of the within bankruptcy case, Huber filed a state court lawsuit against Gunderson in an attempt to recover the subject property. Huber recorded a Notice of Pending Action relating to that suit with the office of the Los Angeles County Recorder on February 27, 1989 as Instrument No. 89-307306.

10. Pursuant to a stipulation dated August 24, 1989 executed by the Trustee, Huber and Gunderson (the "stipulation"), and a related order entered on August 31, 1989, the Trustee sold the subject property to an unrelated third party on September 21, 1989. As provided in the stipulation, the interests of the Trustee, Huber and Gunderson attached to the net proceeds of sale, subject to the costs of

sale as defined in the stipulation, to the same extent, and with the same validity and priority that they had with respect to the subject property (the "subject proceeds"). The Trustee has held those funds since that time.

11. Pursuant to a judgment entered on December 28, 1990 in adversary no. LA 90-01564-SB, the court avoided any interest of Gunderson in the subject proceeds attributable to either the second deed or the third deed, and declared that the subject proceeds are free and clear of any interest of Gunderson. Gunderson did not perfect an appeal from that judgment.

12. Pursuant to an order entered on January 7, 1991, the court fixed the costs of sale at $40,000. After payment thereof, the Trustee presently holds approximately $238,000 as the subject proceeds.

13. Pursuant to an order entered herein on December 13, 1990, the court

dismissed Gunderson from this adversary proceeding.

14. To the extent that any of the conclusions of law are deemed to constitute findings of fact, they are so found and are incorporated herein by this reference.

CONCLUSIONS OF LAW

15. This court has jurisdiction to hear this matter pursuant to 11 U.S.C. §157(b)(2)(A), (B), (C), (E), (K), (N) and (O), and this is a core proceeding. This court can and should enter a final judgment hereon.

16. On the date of filing the petition, the debtor retained an interest in the subject property by virtue of the first deed.

17. Pursuant to 11 U.S.C. § 544 (a)(3), the Trustee had no actual knowledge of Huber's alleged interest in the subject property, including her claim

that she had intended the first deed to be a deed of trust.

18. The occasional locking of bedroom doors on the subject property was in sufficient to impart constructive notice to a bona fide purchaser of Huber's alleged interest in the subject property, including her claim that she had intended the first deed to be a deed of trust.

19. The fact that Huber's mother and two daughters were also living with the debtor and Huber on the subject property on the date of bankruptcy was insufficient to impart constructive notice to a bona fide purchaser of Huber's alleged interest in the subject property, including her claim that she had intended the first deed to be a deed of trust, because Huber's occupancy was not exclusive and because the debtor's occupancy thereof was consistent with his claim of ownership.

20. Neither the amount of the documentary transfer tax cited on the

first deed, nor the name on various utility bills, was sufficient to impart constructive notice to a bona fide purchaser for value of Huber's alleged interest in the subject property, including her claim that she had intended the first deed to be a deed of trust.

21. On the day when this case was commenced, a bona fide purchaser of the subject property from the debtor who perfected his interest at that time would have taken the subject property free and clear of Huber's interest under the first deed, included her claim that she had intended the first deed of trust.

22. The Trustee, who has the rights and powers of such a bona fide purchaser of real property, may avoid the first deed, and takes his interest in the subject proceeds free and clear of Huber's alleged interest therein, pursuant to 11 U.S.C. § 544(a)(3). No determination is made at this time concerning Huber's right

to an unsecured claim against this estate.

23. The Trustee's avoidance of the transfers effected by the second deed and the third deed to Gunderson were automatically preserved for the benefit of the estate pursuant to 11 U.S.C. § 551.

24. Alternatively, Huber may not challenge the post-petition recordation of the first deed because she does not fall within any available statutory exception. That recorded conveyance cut off any remaining interest that Huber had in the subject property.

25. Because the Trustee may avoid and/or takes free and clear of her interest in the subject proceeds, Huber is not entitled to her requested remedy of a constructive trust on funds held by the Trustee.

26. There are disputed issues of fact as to whether Huber's actions constitute unclear hands which would otherwise bar her requested relief. Because the Trustee

prevails on other grounds, that issue is now moot.

27. Huber's request for sanctions against the Trustee and his counsel should be denied with prejudice.

28. Notice of the motion was adequate and proper.

29. The Trustee may recover his costs of suit incurred.

30. To the extent that any of the foregoing findings of fact are deemed to constitute conclusions of laws, they are so found and are incorporated herein by this reference.

/s/ Samuel L. Bufford
UNITED STATES BANKRUPTCY JUDGE

Supreme Court, U.S.
FILED
DEC 5 1994
OFFICE OF THE CLERK

No. 94-747

In The

Supreme Court of the United States

October Term, 1994

EVA M. HUBER,

Petitioner,

v.

CURTIS B. DANNING, TRUSTEE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ERIC P. ISRAEL
DANNING, GILL, DIAMOND & KOLLITZ
a partnership composed of
professional corporations
2029 Century Park East, Suite 1900
Los Angeles, California 90067-3005
(310) 277-0077

Attorneys for Respondent
Curtis B. Danning, Trustee

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page(s)

STATUTES INVOLVED 1

I. STATEMENT OF THE CASE 2

A. Introduction 2

B. Underlying Events 4

C. Bankruptcy History 5

D. The Bankruptcy Court Ruling 7

E. The Bankruptcy Appellate Panel Ruling .. 8

F. The Ninth Circuit Ruling 8

II. BASES TO DENY THE PETITION 8

III. ARGUMENT 10

A. Section 544(a)(3) Is Not Inconsistent With Section 541(d) 10

1. The History of Section 541(d) Reflects the Defects in Huber's Claim 10

2. Section 541(d) Does Not Restrict a Trustee's Rights Under Section 544(a)(3) 11

3. The Ninth Circuit Cases are Not Inconsistent 13

B. The Trustee, As A Bona Fide Purchaser For Value Of The Club Drive Property From The Debtor As Of The Commencement Of The Case, Took Free And Clear Of Huber's Interest 14

1. A Bona Fide Purchaser in California Takes Ahead of an Alleged Constructive Trust Claimant 15

TABLE OF CONTENTS – Continued

Page(s)

2. The Facts Do Not Support Constructive Notice 16

a. Huber's Occupancy Was Not Exclusive, Open or Notorious 16

b. Locks on Bedroom Doors Cannot Constitute Inquiry Notice Which Would Interfere With The Trustee's Rights as a Bona Fide Purchaser... 20

c. The Belief of Occupants of the Property Does Not Raise Constructive Notice to a Buyer 22

d. The Bankruptcy Documents Themselves Do Not Raise Constructive Notice of Huber's Alleged Interest 22

3. Huber's Interest is Precisely the Type of Inchoate Claim that Section 544(a)(3) was Designed to Cut Off... 24

C. The Post-Petition Recordation Of The Subject Deed And The Gunderson Deeds Divested Huber Of Any Legal Interest In The Property..... 26

D. Civil Code § 2950 Bars Huber From Claiming That Her Grant Deed To The Debtor Was Intended To Be A Deed Of Trust... 26

IV. CONCLUSION 29

TABLE OF AUTHORITIES

Page(s)

CASES

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505 (1986) 16

Brown v. Johnson, 98 Cal. App. 3d 844, 159 Cal. Rptr. 675 (1979) 28

Cameron v. Romele, 53 Tex. 238 (1880) 17

Campbell v. Grennan, 13 Cal. App. 481, 110 P. 156 (1910) 17

Chbat v. Tleel (In re Tleel), 876 F.2d 769 (9th Cir. 1989) 14, 15, 16, 25

City National Bank v. General Coffee Corp. (In re General Coffee Corp.), 828 F.2d 699 (11th Cir. 1987), *cert. denied*, 485 U.S. 1007, 108 S. Ct. 1470 (1988) 12

Claremont Terrace Homeowners' Association v. United States, 146 Cal. App. 3d 398, 198 Cal. Rptr. 216 (1983) 16

In re Comstock Financial Services, Inc., 111 B.R. 849 (Bankr. C.D. Cal. 1990) 24

Duncan v. Ledig, 90 Cal. App. 2d 7, 202 P. 2d 107 (1949) 28

Evans v. Faught, 231 Cal. App. 2d 698, 42 Cal. Rptr. 133 (1965) 19

Gibbons v. Yosemite Lumber Co., 190 Cal. 168, 211 P. 4 (1922) 21

High Fidelity Enterprises, Inc. v. Hull, 210 Cal. App. 2d 279, 26 Cal. Rptr. 654 (1962) 16, 17

TABLE OF AUTHORITIES – Continued

Page(s)

Kane v. Huntley Financial, 146 Cal. App. 3d 1092, 194 Cal. Rptr. 880 (1983) 17

Kirgan v. Kirgan, 123 Mont. 34, 207 P. 2d 557 (1949) 17

In re Mill Concepts Corp., 123 B.R. 938 (Bankr. D. Mass. 1991) 13, 14

Mitsui Manufacturers Bank v. Unicom Computer Corp. (*Unicom Computer Corp.*), 13 F.3d 321 (9th Cir. 1994) 13

N.S. Garrott & Sons v. Union Planter National Bank (*In re N.S. Garrott & Sons*), 772 F.2d 462 (8th Cir. 1985) 13

National Bank of Alaska v. Erickson (*In re Seaway Express Corp.*), 912 F.2d 1125 (9th Cir. 1990) .. 13, 14, 16

Pell v. McElroy, 36 Cal. 268 (1868) 18

Probasco v. Eads (*In re Probasco*), 839 F.2d 1352 (9th Cir. 1988) 16, 20

In re Professional Investment Properties of America v. Briggs (*In re Professional Investment Properties of America*), 955 F.2d 623 (9th Cir.), *cert. denied*, 113 S. Ct. 63 (1992) 22, 23

Rafftery v. Kirkpatrick, 29 Cal. App. 2d 503, 85 P. 2d 147 (1938) 15, 17

Rankin v. Coar, 46 N.J. Eq. 566, 22 A. 177 (1890) 17

Robertson v. Peters (*In re Weisman*), 5 F.3d 417 (9th Cir. 1993) 19, 20

Rowley v. Davis, 34 Cal. App. 184, 167 P. 162 (1917) 28

Sanyo Electric, Inc. v. Howard's Appliance Corp. (*In re Howard's Appliance Corp.*), 874 F.2d 88 (2d Cir. 1989) 11, 12

TABLE OF AUTHORITIES – Continued

Page(s)

Scheerer v. Cuddy, 85 Cal. 270, 24 P. 713 (1890) ...18, 19

Swanstrom v. Day, 46 Misc. 311, 93 N.Y.S. 192, *aff'd without op.*, 101 App. Div. 609, 92 N.Y.S. 1147 (1905) 18

Torres v. Eastlick (In re North American Coin & Currency, Ltd.), 767 F.2d 1573, 1575 (9th Cir.), *op. modified*, 774 F.2d 1390 (1985), *cert. denied*, 475 U.S. 1083, 106 S. Ct. 1462 (1986) 24, 25

United States v. Ron Pair Enterprises, Inc. (In re Ron Pair Enterprises, Inc.), 489 U.S. 235, 109 S. Ct. 1026 (1989) 10

United States v. Whiting Pools, Inc., 462 U.S. 198, 103 S. Ct. 2309 (1983) 12

Vineyard v. McKenzie (In re Quality Holstein Leasing), 752 F.2d 1009 (5th Cir. 1985) 11

Wineberg v. Moore, 194 F. Supp. 12 (N.D. Cal. 1961) 16

STATUTES

11 U.S.C.A. § 102(5) (1994) 14

11 U.S.C.A. § 523 (1994) 29

11 U.S.C.A. §§ 541(a)(1)-(4) (1994) ..... *passim*

11 U.S.C.A. § 541(b) (1994) 11

11 U.S.C.A. § 541(d) (1994) ..... *passim*

11 U.S.C.A. § 541(d) (1978) 1, 9, 11

11 U.S.C.A. § 544(a) (1994) 1, 11-13

11 U.S.C.A. § 544(a)(1) (1994) 9, 11-12

11 U.S.C.A. § 544(a)(2) (1994) 9, 11-12

TABLE OF AUTHORITIES – Continued

Page(s)

11 U.S.C.A. § 544(a)(3) (1994) ..... *passim*

11 U.S.C.A. § 547(a) (1994) 13

11 U.S.C.A. § 550(a) (1994) 1

11 U.S.C.A. § 551 (1994) 1, 6, 26

11 U.S.C.A. § 727 (1994) 29

Bankruptcy Act § 709(b) [section 110(a)(b) of former title 11] 12

Pub. L. No. 98-353 (1984) 11

Cal. Civ. Code § 2950 (West 1994) 2, 9, 27-28, 30

RULES

Sup. Ct. R. 10.1 8

No. 94-747

In The

Supreme Court of the United States

October Term, 1994

EVA M. HUBER,

Petitioner,

v.

CURTIS B. DANNING, TRUSTEE,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent respectfully prays that the Court deny the Petition for Writ of Certiorari (the "Petition") brought by petitioner Eva M. Huber ("Huber") requesting that this Court review the unpublished decision of the United States Court of Appeals for the Ninth Circuit.

STATUTES INVOLVED

The Trustee refers to 11 U.S.C.A. §§ 541(a)(1)-(4) and (d), 544(a), 550(a) and 551 (1994); 11 U.S.C.A. § 541(d)

(1978); and Cal. Civ. Code § 2950 (West 1994), each of which is attached in full as an Appendix hereto.

I.

STATEMENT OF THE CASE

A. Introduction.

Respondent Curtis B. Danning, the Chapter 7 trustee (the "Trustee") for the estate of Lance E. Thomas (the "debtor"), is defending a summary judgment he obtained against petitioner Eva M. Huber ("Huber"). That summary judgment (the "judgment") held that since the Trustee has, under section 544(a)(3),[1] the rights and privileges of a *bona fide* purchaser for value under California law without actual knowledge of any adverse claim by Huber, the estate took a parcel of real property commonly known as 2861 Club Drive, Los Angeles, California (the "Club Drive property") free and clear of Huber's alleged interest. The bankruptcy court also found that there were no facts which would impart constructive notice of her claim to a *bona fide* purchaser. The summary judgment was affirmed by both the Bankruptcy Appellate Panel for the Ninth Circuit (the "Panel") and the United States Court of Appeals for the Ninth Circuit.

This brief will focus on the interest which Huber seeks to assert. The underlying adversary proceeding was originally commenced by Huber, among other things, to impose a constructive trust on proceeds of the Club Drive

---

[1] All references herein to sections refer to Title 11 of the United States Code.

property held by the Trustee. In essence, Huber contended that the debtor induced her to duly execute and deliver a grant deed instead of a deed of trust to secure various debts owed by her to the debtor. Through the underlying adversary proceeding, Huber requested, *inter alia*, that the court grant her the equitable remedy of reforming the grant deed at issue, turning it into a deed of trust.

One of the three fundamental flaws in her argument is Huber's assertion that section 541(d) excludes from property of the estate the sort of equitable interest she claims. The statute itself contradicts her position, and the cases which she cites as allegedly being in conflict with that of the Ninth Circuit are distinguishable.

Huber's second fundamental flaw is the requirement under California law that one claiming constructive notice prove, in addition to open and notorious use, her *exclusive* occupancy of the property. This Huber could not do because she admits that the debtor also resided on the Club Drive property when he filed his bankruptcy petition.

The third fundamental flaw is that the evidence to which Huber drew the lower courts' attention does not import constructive notice that the grant deed she executed and tendered to the debtor should have been a deed of trust. The only facts cited by Huber thereof are: (1) the existence of locks on three bedroom doors in the Club Drive property, which was and remains a single family, residential home; and (2) the self-serving statements of Huber's relatives who resided at the time on the Club Drive property with the debtor and Huber that they

believed that Huber owned the property. None of these facts in any way would suggest to anyone that the grant deed was intended to be a deed of trust.

As a result, the bankruptcy court's ruling and the appellate court affirmances were proper, and the Petition should be denied.

B. Underlying Events.

Before bankruptcy, on August 1, 1988, Huber executed a grant deed with respect to the Club Drive property in favor of the debtor (the "subject deed"). Record[2] at 55. Huber had the subject deed duly notarized, and delivered that deed to the debtor. Record at 55, 77. Bankruptcy occurred on *November 21, 1988*. Record at 44. On January 25, 1989 – *after* the debtor's bankruptcy filing – the debtor recorded the subject deed. Record at 55.

On or about August 10, 1988, the debtor duly executed a grant deed with respect to the Club Drive property in favor of Howard Gunderson ("Gunderson"). Record at 3. Although that deed was never recorded, the debtor duly executed another grant deed to Gunderson on January 25, 1989 [post-petition], which was recorded on January 27, 1989. Record at 3, 56. These two deeds collectively shall be referred to hereinafter as the "Gunderson Deeds."

---

[2] Because the Trustee did not receive a designated record from Huber in support of the Petition, all references to the "Record" are to Huber's record before the Ninth Circuit Court of Appeals.

The Club Drive property is and at all relevant times herein was a single family, residential dwelling with a guest house in the back. Record at 331. On the date of bankruptcy, the debtor resided at the Club Drive property with Huber, her two daughters and her mother. Record at 250. Between the time of the execution of the subject deed and the bankruptcy filing date, Huber and the debtor were engaged in an extra-marital relationship. Record at 249.

C. Bankruptcy History.

On November 21, 1988, Lance E. Thomas (the "debtor") filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code. Record at 44. On or about December 27, 1988, Curtis B. Danning was appointed the Chapter 7 trustee for the debtor's estate. Record at 44. Because the debtor failed to schedule any interest in the Club Drive property on his bankruptcy schedules, and no other realizable assets were disclosed, the Trustee filed his no-asset report. When the Trustee became aware of the estate's interest in the Club Drive property, he requested and the court directed the reopening of the case. Record at 335-36. Pursuant to that order, which was entered on August 7, 1989, the Trustee was reinstated in his capacity as Trustee. Record at 378.

Pursuant to a stipulation dated August 24, 1989 between the Trustee, Huber and Gunderson, and an order thereon, the Trustee sold the Club Drive property to an unrelated third party, and the interests of the Trustee, Huber and Gunderson attached to the net proceeds of that sale, subject to the costs of sale as defined therein, to

the same extent and with the same validity and priority that they had with respect to the Club Drive property. Record at 19. Pursuant to an order entered on January 7, 1991, the court fixed the costs of sale at $40,000, and those costs were ordered and have since been paid. Record at 19. Additional items have been paid from those funds pursuant to court order. As a result, the sale proceeds now aggregate approximately $162,000, including accrued interest (the "sale proceeds"). Record at 418 (as adjusted by subsequent accrued interest and expenses).

The Trustee commenced an adversary proceeding against Gunderson to avoid the Gunderson deeds (i.e. the unrecorded pre-petition deed and the unauthorized post-petition deed). Record at 19, 23. Pursuant to a summary judgment entered on December 28, 1990, the court avoided the Gunderson deeds and, pursuant to section 551, those transfers, including the recorded second Gunderson deed, were automatically preserved for the benefit of the estate. Record at 44, 389. That judgment, which is now final, also found that the Trustee held the Club Drive proceeds free and clear of Gunderson's interest. Record at 289-90.

It is also necessarily true that the Trustee held and holds the debtor's interests of all types, including his legal and equitable interests in and to the Club Drive property, as they existed on the date of bankruptcy. Section 541(a).

D. The Bankruptcy Court Ruling.

On or about September 25, 1990, Huber filed suit against the Trustee, the debtor[3] and Gunderson, among other things, to impose a constructive trust on the Club Drive proceeds. Record at 1-9. That proceeding was assigned adversary no. LA 90-02331-SB (the "adversary proceeding"). Record at 1. Pursuant to an order entered on December 13, 1990, the court dismissed Gunderson with prejudice from the adversary proceeding based upon a lack of jurisdiction. Record at 418. The Trustee responded to Huber's complaint and filed a counter-complaint requesting that the court avoid Huber's interest under section 544(a)(3) and/or that the court enter a declaratory judgment that the Trustee took free and clear of her interest. Record at 10-21.

On May 14, 1991, the Trustee filed his Motion for Summary Judgment on All Claims for Relief. Record at 30-71. After extensive briefing, the court granted the Trustee's summary judgment motion. Record at 406-09. That determination was based upon the Trustee's rights under section 544(a)(3), including the lack of constructive notice of Huber's alleged interest. Record at 414-20. On August 21, 1990, the court entered the judgment thereon, making appropriate findings of fact and conclusions of law.[4] Record at 406-20. On August 31, 1991, Huber filed

---

[3] To the best of the Trustee's knowledge, the summons and complaint were never served on the debtor, and the claims therein against him have not been prosecuted.

[4] Unfortunately, although the Trustee submitted evidentiary objections to most of Huber's proffered evidence, Record at 266-69, 395-98, the court never ruled thereon. As a result, it will

her Notice of Appeal to the Bankruptcy Appellate Panel for the Ninth Circuit.

E. The Bankruptcy Appellate Panel Ruling.

On December 3, 1992, the Panel affirmed the bankruptcy court's entry of the summary judgment in the adversary proceeding, with one dissent. Record at 475-502. That decision was published at 147 B.R. 526 (Bankr. 9th Cir. 1992) and is attached as Huber's Appendix B. On January 4, 1993, Huber filed her Notice of Appeal from the Panel's opinion.

F. The Ninth Circuit Ruling.

On July 27, 1994, the Ninth Circuit Court of Appeals affirmed the Panel's affirmance in an unpublished opinion. Huber's Appendix A. On October 24, 1994, this Court docketed Huber's Petition.

II.

BASES TO DENY THE PETITION

The Petition should be denied because there are no special or important reasons in support thereof, as required by Supreme Court Rule 10.1. As discussed below, Huber has failed to cite to *any* federal appellate decisions concerning a trustee's "*bona fide* purchaser

---

be assumed for purposes of the Petition that her evidence was considered.

avoidance power" under section 544(a)(3) contrary to that of the Ninth Circuit below.

Huber incorrectly cites to a split in authority among the circuit courts of appeal concerning whether section 541(d) excludes equitable interests avoided by a trustee under section 544(a)(3). Although she states that four (4) circuits courts have held contrary to the Ninth Circuit, a close reading of those cases clearly provides to the contrary. Each of those cases dealt with a trustee's powers under section 544(a)(1) or (2) relating to *personal property*, or was determined under the Bankruptcy Code as it existed before Congress enacted amendments in 1984 which clarified the matter. *Compare* 11 U.S.C.A. § 541(d) (1978) [Trustee's Appendix E] *with* 11 U.S.C.A. § 541(d) (1994) [Trustee's Appendix A].

As to her second issue, Huber contends that all three federal courts below misapplied California law on the rights of a *bona fide* purchaser for value. To the contrary, those courts acknowledged that California, before finding constructive notice to interfere with the rights of a *bona fide* purchaser for value, requires that one be in exclusive, open and notorious possession of the property. No such exclusive possession occurred here, because the debtor resided on the property at all relevant times. Moreover, Huber never challenged his occupancy.

Additional independent grounds exist to deny the Petition in this case. First, even if Huber otherwise were entitled to obtain the imposition of a constructive trust, California law clearly provides that a *bona fide* purchaser takes ahead of a constructive trust claimant. Second, Cal. Civil Code § 2950 (West 1994) [Trustee's Appendix F]

mandates that one may not offer evidence that a grant deed unconditional on its face should be reformed to reflect omitted conditions as against a *bona fide* purchaser, as Huber seeks. Third, the Trustee's successful avoidance and preservation of the Gunderson deeds creates an independent basis for the Trustee to take free of any constructive trust claim. For all of these reasons, the Court should deny the Petition.

III.

ARGUMENT

A. Section 544(a)(3) Is Not Inconsistent With Section 541(d)

1. The History of Section 541(d) Reflects the Defects in Huber's Claim.

The focal point of Huber's argument is section 541(d). However, that statute expressly limits only the debtor's property brought into the estate under section 541(a)(1) or (2). In contrast, avoidance power rights are brought into the estate pursuant to section 541(a)(3) and (4). Because this Court has repeatedly enunciated its position that the Bankruptcy Code is to be construed in accord with its express language, at least absent a statutory ambiguity, the Court need look no further to deny the Petition. *United States v. Ron Pair Enterprises, Inc.* (*In re Ron Pair Enterprises, Inc.*), 489 U.S. 235, 242, 109 S. Ct. 1026, 1031 (1989).

Huber conveniently omits any discussion of the amendments Congress passed to section 541(d). As it now reads, 541(d) serves to limit only that property brought

into the estate under section 541(a)(1) or (b). 11 U.S.C.A. § 541(d) (1994). The original statute did not express any such limitation, 11 U.S.C.A. § 541(d) (1978), because in 1984 Congress amended section 541(d). Pub. L. No. 98-353 (1984). Thus, Huber's reliance on cases wherein the bankruptcy petition was filed prior to 1984 is misplaced, as discussed below.

2. Section 541(d) Does Not Restrict a Trustee's Rights Under Section 544(a)(3).

Huber bases the Petition upon an alleged split in the circuits in interpreting section 541(d), contending that four (4) circuit courts have held contrary to the Ninth Circuit's decision below. Huber misreads the holdings in her characterization of those four cases.

Huber contends that the Fifth Circuit, in *Vineyard v. McKenzie* (*In re Quality Holstein Leasing*), 752 F.2d 1009, 1013 (5th Cir. 1985), held that "§ 541(d) overrides § 544(a)." Huber brief at p. 13. Instead, *Quality Holstein* held only that unperfected liens against certain aircraft which had not been impressed with a constructive trust prior to the bankruptcy filing would be subject to avoidance by the trustee under section 544(a)(1) and (2). *Id.* at 1013-14. Of course, that case involved personal property. Huber also failed to perfect any constructive trust claim prior to the debtor's bankruptcy filing. Record at 322. It is interesting to note that the Fifth Circuit came to this result even under the version of section 541(d) existing prior to 1984. Appendix E.

Huber also cites to *Sanyo Electric, Inc. v. Howard's Appliance Corp.* (*In re Howard's Appliance Corp.*), 874 F.2d

88 (2d Cir. 1989). However, that case involved air conditioners, which are also personal property. *Id.* at 90. Under section 544(a)(1), the court held that a constructive trust claim which was impressed prior to the bankruptcy filing prevailed against a hypothetical judgment lien creditor under New Jersey law. *Id.* at 95. As discussed below, a *bona fide* purchaser of real property in California takes ahead of a constructive trust claimant. In addition, Huber failed to perfect her constructive trust prior to the bankruptcy filing, as specifically required by *Sanyo*. *Id.* at 95.[5]

In *City National Bank v. General Coffee Corp.* (*In re General Coffee Corp.*), 828 F.2d 699 (11th Cir. 1987), *cert. denied*, 485 U.S. 1007, 108 S. Ct. 1470 (1988), the court held that a constructive trust claimant prevailed over the trustee's hypothetical judgment lien creditor powers for personal property (a pool of cash). *Id.* at 705-06. Perhaps most significantly, the court in *General Coffee* acknowledged but expressly did not resolve the issue, as it stated that the personal property in that case would be excluded either way. *Id.* However, the court specifically stated that under Florida law, a *bona fide* purchaser for value would take real property ahead of a constructive trust claimant.

---

[5] The court in *Sanyo* criticized an earlier decision of the Ninth Circuit which it viewed in conflict with certain dicta on this subject contained in *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 204 n.8, 103 S. Ct. 2309, 2313 n.8 (1983). *Sanyo*, 874 F.2d at 93 n.5. However, it should be noted that *Whiting Pools* arose under the old Bankruptcy Act, which was replaced by the Bankruptcy Code. One key change was to broaden the scope of property of the estate. *Compare* Bankruptcy Act § 709(b) [section 110(a)(b) of former title 11] *with* section 541(a).

Id. As discussed below, California law provides the same result.

The last case relied upon by Huber is *N.S. Garrott & Sons v. Union Planter National Bank* (*In re N.S. Garrott & Sons*), 772 F.2d 462 (8th Cir. 1985). However, that case also dealt with personal property (a fund of cash) and did not discuss section 544 at all. *Id.* at 465. Instead, the Trustee's attempt to bring in the property under section 541(a)(1) failed because of the exclusion under section 541(d) for equitable interests. *Id.* at 466-67. That case is entirely distinguishable. Thus, Huber's attempt to create a conflict among the circuits must fail.

3. The Ninth Circuit Cases are Not Inconsistent.

Although not necessary for any ruling from this Court, Huber contends that *Mitsui Manufacturers Bank v. Unicom Computer Corp.* (*Unicom Computer Corp.*), 13 F.3d 321 (9th Cir. 1994) is inconsistent with prior Ninth Circuit cases. Huber Brief at p.17. However, *Unicom* involved an attempt to recover personal property (a pool of cash) as a preference under section 547(a). *Id.* at 323. The court never discussed section 544(a), and likely would have come to the same result because of the trustee's lower priority under that section viz-a-viz constructive trust claimants for personal property.

Huber also argues that *National Bank of Alaska v. Erickson* (*In re Seaway Express Corp.*), 912 F.2d 1125 (9th Cir. 1990), was incorrectly decided. Huber Brief at p. 22. Huber instead argues for the principle stated in *In re Mill Concepts Corp.*, 123 B.R. 938 (Bankr. D. Mass. 1991). The

court in *Mill Concepts* ruled that, notwithstanding the express statutory language, a trustee's rights under section 544(a)(3) are limited to avoiding transfers and further limited by section 541(d) (i.e. that equitable interests like a constructive trust are removed from property of the estate). *Id.* at 941-42, 945-47.

As to the former issue, section 544(a) specifically provides that a trustee has "the rights and powers of, or may avoid any transfer . . . this is voidable by" a *bona fide* purchaser. Pursuant to section 102(5), "or" is not exclusive. A trustee is not limited to avoiding transfers under that statute. *Seaway Express*, 912 F.2d at 1129-30; *see Chbat v. Tleel* (*In re Tleel*), 876 F.2d 769, 771-72 (9th Cir. 1989).

B. The Trustee, As A Bona Fide Purchaser For Value Of The Club Drive Property From The Debtor As Of The Commencement Of The Case, Took Free And Clear Of Huber's Interest

The Trustee does not dispute that, outside of bankruptcy, a constructive trust is a remedy which a wronged party may seek; nor does he dispute that, outside of bankruptcy, the remedy of reformation is available where, as between the named grantor and grantee, a grant deed was intended to be for security purposes. However, "inside" of bankruptcy, the focus is on section 544(a)(3). This dispute is not between the grantor and grantee, but the grantor's creditors. California law is only relevant to determine what rights would be possessed by a *bona fide* purchaser for value of real property without actual notice of any defect.

1. A Bona Fide Purchaser in California Takes Ahead of an Alleged Constructive Trust Claimant

Huber's complaint filed in the underlying adversary proceeding asked that the bankruptcy court impose a constructive trust upon the proceeds of the sale of the Club Drive property based on alleged improprieties committed by the debtor. However, even if it is assumed that Huber's interest could have qualified for a constructive trust outside of bankruptcy, the Trustee, stepping into the shoes of a *bona fide* purchaser from the debtor of the property without knowledge of Huber's claim, takes free of Huber's alleged interests.

Under California law, a *bona fide* purchaser of the Club Drive property from the debtor on the date of bankruptcy would have taken title free and clear of Huber's alleged, unperfected and unresolved constructive trust on the house. *Rafftery v. Kirkpatrick*, 29 Cal. App. 2d 503, 507-08, 85 P. 2d 147, 150 (1938); *see Tleel*, 876 F.2d at 771-72. Huber admits that she executed and delivered a grant deed that, on its face, transferred all of her interest in the Club Drive property to the debtor prior to his bankruptcy filing. Thus, she gave Thomas legal title to the property. Perhaps more importantly, she empowered the debtor with the ability to sell that property to a *bona fide* purchaser for value. That *bona fide* purchaser would take free of Huber's alleged constructive trust claim. The Trustee, by operation of bankruptcy law, is such a *bona fide* purchaser. Section 544(a)(3).

2. The Facts Do Not Support Constructive Notice

As cited by Huber, the Ninth Circuit has held that, under California law, the rights of a *bona fide* purchaser, and hence the Trustee's rights based thereon, are subject to "constructive and inquiry notice." *E.g., Probasco v. Eads (In re Probasco)*, 839 F.2d 1352, 1354 (9th Cir. 1988); *Seaway Express*, 912 F.2d at 1129; *Tleel*, 876 F.2d at 773. Constructive notice requires tangible facts which would place a prudent purchaser on inquiry notice of the claims of another. *Probasco*, 839 F.2d at 1354. *In this case, however, there was no constructive or inquiry notice with which a* bona fide *purchaser for value would be charged.*

a. Huber's Occupancy Was Not Exclusive, Open or Notorious

Under California law, the burden of proof on the issue of constructive notice is on the party who claims that notice should be implied. *Wineberg v. Moore*, 194 F. Supp. 12, 17 (N.D. Cal. 1961); *High Fidelity Enterprises, Inc. v. Hull*, 210 Cal. App. 2d 279, 281, 26 Cal. Rptr. 654, 655-56 (1962). In a summary judgment proceeding, the burdens remain where they would be at trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S. Ct. 2505, 2512 (1986).

In order for Huber to establish constructive notice based upon her possession of the premises, she would have to prove that her use and occupation was open, notorious, visible, and exclusive. *E.g., Claremont Terrace Homeowners' Association v. United States*, 146 Cal. App. 3d 398, 408, 198 Cal. Rptr. 216, 222 (1983); *Probasco*, 839 F.2d

at 1354-56; *High Fidelity*, 26 Cal. Rptr. at 655. Even setting aside the other necessary elements, Huber cannot prove that her use was exclusive, open or notorious.

Here, the Trustee does not dispute that Huber, her two daughters and her mother were living at the Club Drive property when the debtor filed his petition. However, it is equally undisputed that the debtor, as of the bankruptcy filing date, was also living in the premises. Hence, a potential buyer would have seen that the debtor's occupancy was consistent with his claim of ownership. Huber therefore fails to satisfy the requisite exclusive and notorious use requirements, and no constructive notice is to be imparted.

Many courts have determined that, when one holding title occupies property jointly with a stranger to title claiming an interest therein, the occupancy of the party in title does not provide constructive notice of his or her interest. *Rafftery*, 29 Cal. App. 2d at 506, 85 P. 2d at 149-50 (1938); *Campbell v. Grennan*, 13 Cal. App. 481, 483, 110 P. 156, 157 (1910); *Rankin v. Coar*, 46 N.J. Eq. 566, 22 A. 177, 178-79 (1890); *see Kane v. Huntley Financial*, 146 Cal. App. 3d 1092, 194 Cal. Rptr. 880 (1983). In those circumstances, the law regards possession as being with the title holder, and there is no presumption of an interest of the title holder inconsistent with the other joint occupant. *See Campbell*, 110 P. at 157; *Cameron v. Romele*, 53 Tex. 238, 244 (1880). This general rule is often applied when the joint occupants are related to one another. *See, e.g., Kirgan v. Kirgan*, 123 Mont. 34, 207 P. 2d 557 (1949). Most significantly, this general rule has also been applied where, as in the case at bar, the grantor is a joint occupant with the

grantee. *See Swanstrom v. Day*, 46 Misc. 311, 93 N.Y.S. 192, *aff'd without op.*, 101 App. Div. 609, 92 N.Y.S. 1147 (1905).

Huber cites to *Scheerer v. Cuddy*, 85 Cal. 270, 24 P. 713 (1890). There, the California Supreme Court specifically stated that the unrecorded interest (in that case a lease) was binding as between the parties to that writing, but not as against a third party *bona fide* purchaser. *Id.* at 714. However, Huber cannot claim that the unrecorded deed is not binding upon her as against the Trustee, who not only succeeds to the rights of the debtor – a party to that deed – but also has the rights of a *bona fide* purchaser.

More importantly, the *Cuddy* court specifically stated:

> 'The fact of *open, notorious, and exclusive possession and occupation* of lands *by a stranger to a vendor's title*, as of record, at the time of a purchase *from* and conveyance by *such a vendor out of possession*, is sufficient to put such purchaser upon inquiry as to the legal and equitable rights of the party so in possession, and such vendee is presumed to have purchased and taken a conveyance from the vendor with full notice of all the legal and equitable rights in the premises of such party in possession and in subordination to these rights . . . '

Id. (*quoting Pell v. McElroy*, 36 Cal. 268 (1868)) (emphasis added).

Huber is not within the rule stated in *Cuddy* because: (1) she did not have exclusive possession or make notorious use of the property, as the debtor himself (as well as others) were living there; (2) the debtor was not "out of possession" – he resided on the property at all relevant times; and (3) the debtor's presence with Huber's family

members was not inconsistent with the deed from Huber to the debtor when they were admittedly co-habitating in an extramarital relationship, and Huber was the grantor under the debtor's claim of ownership. Thus, *Cuddy* actually supports only *the Trustee's position.*

Huber also relies on *Evans v. Faught*, 231 Cal. App. 2d 698, 42 Cal. Rptr. 133 (1965). Huber summarizes that case as follows:

> a City's *exclusive occupancy* of part of a larger piece of raw land being sold, on which parcel the City had built a structure and a road pursuant to an unrecorded lease, put the buyer on inquiry notice of the City's interest, where the possession was 'open, *notorious, exclusive, adverse,* and not consistent with the record of title.'

Huber's Brief at p. 26 (*citing Evans*, 42 Cal. Rptr. at 137) (emphasis added). However, that case involved commercial property. Here there was no exclusive, notorious or adverse possession of even a portion of the property, which is a residential house, certainly not something as tangible as a separate building and road which the *Evans* court found to raise inquiry notice. Rather, Huber admits that her occupancy of the Club Drive property was not exclusive (because the debtor and Huber's family lived on the property at all relevant times). For that same reason, the use was not inconsistent with the legal title.

Huber also cites to *Robertson v. Peters* (*In re Weisman*), 5 F.3d 417 (9th Cir. 1993) to support her attempt to impart constructive notice. In *Weisman*, the Ninth Circuit found that constructive notice of the fact that others resided on the property without the debtor would bar a *bona fide*

purchaser from taking free of their interest under California law. *Id.* at 422. The Trustee agrees with that result, which is distinguishable because in the case at bar, at all relevant times the debtor also lived on the Club Drive property.

b. Locks on Bedroom Doors Cannot Constitute Inquiry Notice Which Would Interfere With The Trustee's Rights as a Bona Fide Purchaser

At the hearing on the motion for summary judgment, Huber offered evidence that certain family members resided with the debtor and her at the Club Drive property, and that their bedroom doors were at times locked. The Trustee has assumed only for purposes of the summary judgment motion and these appeals that these facts are true, but asserts that they fail to establish constructive notice of *Huber's* alleged interest.

Huber cites to *Probasco* for a case wherein this court found that there was constructive notice. *Probasco,* 839 F.2d at 1356. However, *Probasco* is clearly distinguishable. That case involved the issue of whether a third parcel of raw land was to be included on a deed with two other adjoining lots. *Id.* at 1353. There, a single fence around all three parcels, uninterrupted roadways connecting all three parcels, one subdivision map for all three parcels filed with the county clerk and construction occurring at the time on all three parcels was sufficient to constitute constructive notice that those lots were all owned by one owner. *Id.* However, our case concerns *residential* real property, with the debtor residing at all relevant times on

the premises. A third party would simply not have been put upon inquiry notice of any adverse claim, much less of an alleged contingency in an otherwise clear grant deed.

Huber fails to cite to *any* cases which find constructive notice from locks on doors inside a residential home. Rather, the California Supreme Court has stated that "the acts of dominion [necessary to constitute constructive notice] must be adapted to the particular land, its condition, locality, and appropriate use." *Gibbons v. Yosemite Lumber Co.*, 190 Cal. 168, 172, 211 P. 4, 5 (1922).

Here, the Trustee submits that it is clear that most or all residential homes (like the Club Drive property) have rooms which can be locked at appropriate times. Bedroom doors which may be locked, but admittedly were not at all times, clearly cannot rise to the level of constructive notice of an adverse interest. For if they did, where would the analysis end? Would it be sufficient that a bathroom door can be locked from the inside to maintain privacy? Or that a barn was not locked with a padlock, but could only be opened from one side? Does the court have to determine what kind of locks these were, and who had keys? Moreover, there is no evidence that the locks were visible from outside either the rooms or the house. In any event, what does a lock on a bedroom door give inquiry notice of? – certainly not that a grant deed should be a deed of trust! The triviality of the scenario reflects the inherent lack of substance to Huber's entire argument.

Huber has not claimed that any of her three family members had leasehold interests or any other interest in the property of which a third party would be on inquiry notice. Clearly, neither of the daughters nor the mother have claimed any interest in the Club Drive property or the proceeds thereof.

c. The Belief of Occupants of the Property Does Not Raise Constructive Notice to a Buyer

The belief of third parties residing on the premises as to the state of title does not raise constructive notice. The cases cited by Huber, as well as those addressed here, clearly provide that constructive notice is based upon objective facts which would put a third party on notice of another's claim (i.e. a third party tenant's residence on the property, fences around the land indicating joint ownership with adjacent parcels, etc.). Such is not the case here.

d. The Bankruptcy Documents Themselves Do Not Raise Constructive Notice of Huber's Alleged Interest

For the first time at the appellate court level, Huber argued that the bankruptcy documents themselves raise constructive notice of her purported interest. It should be noted that the schedules were not even offered before the bankruptcy court or made part of the record on appeal.

Aside from these procedural problems, Huber cites to *In re Professional Investment Properties of America v. Briggs*

(*In re Professional Investment Properties of America*), 955 F.2d 623 (9th Cir.), *cert. denied*, 113 S. Ct. 63 (1992) for the proposition that information disclosed in bankruptcy documents can raise constructive notice. However, in that case, the court ruled that specific disclosures in an involuntary petition could constitute constructive notice of an unrecorded deed of trust. *Id.* at 630. In Huber's case, however, the petition and schedules disclose no liens or interests in favor of Huber. Hence, no constructive notice could be derived from those documents.

Huber also cites to *Professional Investment Properties* for the proposition that "a diligent title search" would have revealed that she was the record owner. Huber Brief at p. 31. However, in the case at bar Thomas held a duly-executed (but unrecorded) grant deed from Huber to the Club Drive property on the bankruptcy date. Record at 45. His claim of ownership to the Club Drive property was entirely consistent with the subject deed, as was the fact that Huber was the record (c.f. legal) owner (as the subject deed was not recorded as of the bankruptcy date). These facts clearly distinguish this case from *Professional Investment Properties*. In addition, one must ask *of what* would either of these facts have given a *bona fide* purchaser constructive notice? Certainly not that the subject deed was intended to be for security purposes only. Hence, this new argument raised by Huber for the first time on appeal, and unsupported in the record, is devoid of merit.

3. Huber's Interest is Precisely the Type of Inchoate Claim that Section 544(a)(3) was Designed to Cut Off

It has been aptly stated that a constructive trust, which is what Huber seeks, "is an equitable remedy . . . designed to *equitably* distribute property or monies . . . " *In re Comstock Financial Services, Inc.*, 111 B.R. 849, 859 (Bankr. C.D. Cal. 1990) (emphasis in original). However, constructive trusts are "disfavored" in bankruptcy because they disrupt the equitable distribution of estate property to all creditors. *Torres v. Eastlick (In re North American Coin & Currency, Ltd.)*, 767 F.2d 1573, 1575 (9th Cir.), *op. modified*, 774 F.2d 1390 (1985), *cert. denied*, 475 U.S. 1083, 106 S. Ct. 1462 (1986); *Comstock*, 111 Bankr. at 859-60. In fact, the Ninth Circuit in *North American Coin* aptly stated:

> While we agree that any constructive trust that is given effect must be a creature of [state] law, we cannot accept the proposition that the bankruptcy estate is automatically deprived of any funds that state law might find subject to a constructive trust. We refuted that proposition in *In re Esgro, Inc.*, 645 F.2d 794, 797 (9th Cir. 1981) and *Elliott v. Bumb*, 356 F.2d 749, 753 (9th Cir.), *cert. denied*, 385 U.S. 829, 87 S. Ct. 67, 17 L.Ed.2d 66 (1966), where we held that, because of countervailing policies behind the Bankruptcy Act, state law could not be permitted to impose a trust on commingled property of a bankrupt's estate. A constructive trust is not the same kind of interest in property as a joint tenancy or a remainder. It is a remedy, flexibly fashioned in equity to provide relief where a

> balancing of interests in the context of a particular case seems to call for it. Moreover, in the case presented here it is an inchoate remedy; we are not dealing with property that a state court decree has in the past placed under a constructive trust. We necessarily act very cautiously in exercising such a relatively undefined equitable power in favor of one group of potential creditors at the expense of other creditors, for ratable distribution among all creditors is one of the strongest policies behind the bankruptcy laws. *See In re Visiting Home Services, Inc.*, 643 F.2d 1356, 1360 (9th Cir. 1981); *Hassen v. Jonas*, 373 F.2d 880, 881 (9th Cir. 1967).

North American Coin, 767 F.2d at 1575 (some citations omitted). Clearly, this sort of favoritism over other creditors is precisely what Huber seeks through a constructive trust.

Upon duly executing the grant deed to the debtor, Huber not only empowered him with the ability to convey that property to a *bona fide* purchaser for value, but also conveyed to him legal title to the Club Drive property. Upon his bankruptcy filing, the debtor in fact transferred that property by operation of law (section 541(a)) to a *bona fide* purchaser for value without actual knowledge of any defect – the Trustee. Section 544(a)(3). At that time, at the most Huber had a mere equitable interest in the property (i.e. a constructive trust claim). However, such unrecorded interests are avoidable under section 544(a)(3): "an asserted [i.e. non-judicially determined] constructive trust clearly represents the kind of inchoate claim that section 544(a)(3) was designed to cut off." *Tleel*, 876 F.2d at 773. Similarly, the Trustee submits that

Huber's interest is precisely the type of inchoate claim against property of the estate which section 544(a)(3) was designed to cut off.

C. The Post-Petition Recordation Of The Subject Deed And The Gunderson Deeds Divested Huber Of Any Legal Interest In The Property

Because the subject deed was recorded shortly after the bankruptcy filing, any defect in the Trustee's claim to the Club Drive property was cured.

In addition, it is undisputed that shortly after the recordation of the subject deed, the second Gunderson deed was recorded. Because the Trustee succeeded in avoiding the Gunderson deeds, section 551 automatically preserved that conveyance for the benefit of the estate. As discussed above, property brought into the estate under section 551 via section 541(a)(4) is *not* subject to the exclusion of equitable interests under section 541(d). This is an independent basis upon which the Trustee takes ahead of Huber.

Either way, any defect in title is cured by the recordation of the grant deed from Huber and/or the (avoided and preserved) grant deed(s) from the debtor to Gunderson.

D. Civil Code § 2950 Bars Huber From Claiming That Her Grant Deed To The Debtor Was Intended To Be A Deed Of Trust

Although it was not one of the legal theories relied upon by the bankruptcy court, the Trustee argued before

that trial court and both appellate courts, and now submits that California Civil Code § 2950 bars any judgment in favor of Huber. Trustee's Appendix F. That statute provides as follows:

> *Defeasance, to affect grant absolute on its face, must be recorded.* When a grant of real property purports to be an absolute conveyance, but is intended to be defeasible on the performance of certain conditions, such grant is not defeated or affected as against any person other than the grantee or his heirs or devisees, or persons having actual notice, unless an instrument of defeasance, duly executed and acknowledged, shall have been recorded in the office of the County Recorder of the county where the property is situated.

Thus, § 2950 is an entirely independent basis upon which this court may affirm the judgment.

The Trustee submits that § 2950 is the "missing link" in Huber's *bona fide* purchaser analysis. Specifically, although Huber argues that the recorded grant deed was intended only to secure her repayment of loans to the debtor, she relies instead upon cases that discuss whether physical facts lead to constructive notice of *unrecorded interests* (i.e. unrecorded leases, adverse possession, etc.). The grant deed at issue is absolute and clear on its face, and it is a *recorded interest*. Nevertheless, Huber requested that the bankruptcy court, in contravention of Civil Code § 2950, *inter alia*, make the grant deed conditional upon non-repayment of those loans.

Each of the three located cases which interprets § 2950 supports the Trustee's position. Although that

statute refers only to actual knowledge, and it is clear that the Trustee had no actual knowledge that the grant deed at issue was intended to be a deed of trust, one of the cases refers also to constructive notice. However, that case, *Brown v. Johnson*, 98 Cal. App. 3d 844, 159 Cal. Rptr. 675 (1979), held that recording a "notice of vendor's lien" could not provide constructive notice that a grant deed was intended to be a deed of trust. *Id.* at 678. *See also Duncan v. Ledig*, 90 Cal. App. 2d 7, 202 P. 2d 107 (1949) (grant deed would not be reformed to be deed of trust); *Rowley v. Davis*, 34 Cal. App. 184, 167 P. 162 (1917) (grant deed would not be reformed to be a deed of trust). Because the Trustee is not an heir or devisee, nor a person with actual knowledge of the alleged contingencies affecting the grant deed, section 2950 is an alternate basis for upholding the judgment in favor of the Trustee.

This statute is also precisely why the dissenting voice within the Panel's decision is legally incorrect. The entire argument raised by the dissent is based upon the proposition that in state court "Huber would be entitled to a hearing on her contention that the deed, while absolute on its face, was in fact a deed of trust and that she had a considerable equitable interest in the property." Huber Appendix B-40. Of course, that determination specifically is forbidden by Civil Code § 2950, which would bar Huber from offering any such evidence, even in a state court proceeding.

IV.

CONCLUSION

If, as Huber alleges, the debtor committed a fraud by advising her that the grant deed which she signed and delivered was merely a deed of trust, that is indeed unfortunate. However, Huber's remedy was to file a claim against this estate (which she has done) and, to the extent she believed appropriate, to file an action against the debtor to deem that claim nondischargeable. Sections 523, 727. However, the debtor's allegedly fraudulent acts are not a defense to the Trustee's rights under section 544(a)(3).

In the end analysis, Huber's problem is that she duly executed a grant deed in favor of the debtor concerning the Club Drive property and tendered that deed to him. As a result, Huber put the debtor in the position of being able to convey that property to a *bona fide* purchaser for value. In fact, by operation of law from the debtor's bankruptcy filing, the Trustee has now become that *bona fide* purchaser for value.

Locks on bedroom doors and co-occupancy with others not exclusive in the one claiming unrecorded rights in the property, cannot constitute constructive notice as against a *bona fide* purchaser for value in California. Nor can bankruptcy documents which are silent on the subject raise such a need to conduct an inquiry. As a result, Huber has failed to meet her burden of establishing that the Trustee was subject to any constructive notice of her alleged interest in the property. Huber's constructive trust claim must fail, and the Trustee must prevail.

The preserved conveyance to Gunderson also is by statute clear of equitable interests such as that asserted by Huber. In addition, Civil Code section 2950 specifically bars the relief which Huber requests.

The bankruptcy court properly resolved the issue at the trial court level, and entered the judgment. The Panel and the Ninth Circuit both affirmed. The Trustee respectfully requests that this Court deny the Petition.

DATED: December 5, 1994

Respectfully submitted,

ERIC P. ISRAEL
DANNING, GILL, DIAMOND
& KOLLITZ
a partnership composed of
professional corporations
2029 Century Park East, Suite 1900
Los Angeles, California
90067-3005
(310) 277-0077

Attorneys for Respondent
Curtis B. Danning, Trustee

APPENDIX A

§ 541. Property of the estate

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

> (1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.
>
> (2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is –
>
> > (A) under the sole, equal, or joint management and control of the debtor; or
> >
> > (B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.
>
> (3) Any interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this title.
>
> (4) Any interest in property preserved for the benefit of or ordered transferred to the estate under section 510(c) or 551 of this title. . . .
>
> . . .

(d) Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest, such as a mortgage secured by real property, or an interest in such a mortgage, sold by the

debtor but as to which the debtor retains legal title to service or supervise the servicing of such mortgage or interest, becomes property of the estate under subsection (a)(1) or (2) of this section only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.

APPENDIX B

§ 544. Trustee as lien creditor and as successor to certain creditors and purchasers.

(a) The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by –

(1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists;

(2) a creditor that extends credit to the debtor at the time of the commencement of the case, and obtains, at such time and with respect to such credit, an execution against the debtor that is returned unsatisfied at such time, whether or not such a creditor exists; or

(3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.

APPENDIX C

§ 550. Liability of transferee of avoided transfer

(a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from –

(1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or

(2) any immediate or mediate transferee of such initial transferee.

APPENDIX D

§ 551. Automatic preservation of avoided transfer

Any transfer avoided under section 522, 544, 545, 547, 548, 549, or 724(a) of this title, or any lien void under section 506(d) of this title, is preserved for the benefit of the estate but only with respect to property of the estate.

APPENDIX E

§ 541

(d) Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest, such as a mortgage secured by real property, or an interest in such a mortgage, sold by the debtor but as to which the debtor retains legal title to service or supervise the servicing of such mortgage or interest, becomes property of the estate under subsection (a) of this section only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.

APPENDIX F

§ 2950. Instrument of defeasance affecting grant in absolute form; necessity of recording

DEFEASANCE, TO AFFECT GRANT ABSOLUTE ON ITS FACE, MUST BE RECORDED. When a grant of real property purports to be an absolute conveyance, but is intended to be defeasible on the performance of certain conditions, such grant is not defeated or affected as against any person other than the grantee or his heirs or devisees, or persons having actual notice, unless an instrument of defeasance, duly executed and acknowledged, shall have been recorded in the office of the County Recorder of the county where the property is situated.